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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-336

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,

*Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

## APPENDIX

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# APPENDIX A

## UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

**Nos. 74-1229; 74-1390; 74-1449; 74-1514; 74-1515; 74-1516.**

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**No. 74-1220**

| | |
|---|---|
| The North Carolina Utilities Commission, | Petitioner, |
| Southeastern Association of Regulatory Utility Commission, | Intervenor. |
| versus | |
| The Federal Communications Commission and the United States of America, | Respondents. |
| International Telephone and Telegraph Communications, | Intervenor. |
| Southern Pacific Communications Company, | Intervenor. |
| Data Transmission Company, | Intervenor. |
| National Retail Merchants Association, Inc., | Intervenor. |
| International Business Machines Corporation, | Intervenor. |
| Southeastern Association of Regulatory Utility Commissioners, | Intervenor. |
| Computer and Business Equipment Manufacturers Assoc. (CBEMA), | Intervenor. |

Utilities Telecommunications Council, Intervenor.

MCI Telecommunications Council, Intervenor.

Telerent Leasing Corporation; Crescent Industries, Inc.; Long Engineering Company; Petty Communications, Inc.; Tele-Sound Company, Inc.; Telephone Interconnect Company; North American Telephone Association, Intervenor.

Central Committee on Communication Facilities of the American Petroleum Institute, Intervenor.

Remote Processing Services Section of the Association of Data Processing Service Organizations, Inc., Intervenor.

Aeronautical Radio, Inc.; Air Transport Association of America, Intervenor.

**No. 74-1390**

Carolina Telephone and Telegraph Company and United Telephone Company of the Carolinas, Inc., Petitioners,

versus

Federal Communications Commission and the United States of America, Respondent.

National Retail Merchants Association, Inc., Intervenor.

The North America Telephone Association, Intervenor.

**No. 74-1449**

American Telephone and Telegraph Company and Associated Bell System Companies, Petitioners,

versus

Federal Communications Commission
and The United States of America, Respondents.

National Retail Merchants Association,
Inc., MCI Telecommunications Corporation,
and Southern Pacific Communications
Company, Intervenors.

Telerent Leasing Corp.; Crescent Industries,
Inc.; Long Engineering Company; Petty Communications, Inc.; Tele-Sound Company, Inc.;
North American Telephone Assoc., Intervenor.

**No. 74-1514**

National Association of Regulatory
Utility Commissioners, Petitioner,

versus

Federal Communications Commission and
United States of America, Respondents.

and
Southern Pacific Communications
Company, MCI Telecommunications
Corporation, The National Retail Merchants
Association, Inc., and North American
Telephone Association, Intervenor.

**No. 74-1515**

United States Independent Telephone
Association, Petitioner,

versus

Federal Communications Commission,
and United States of America, Respondents.

and

Southern Pacific Communications Company,
MCI Telecommunications Corporation,
The National Retail Merchants Association
Inc., and Telerent Leasing Corporation,
et al, Intervenor.

**No. 74-1516**

Continental Telephone Corporation, Petitioner,

versus

Federal Communications Commission
and United States of America, Respondents.

MCI Telecommunications Corp., Intervenor.

National Retail Merchants
Association, Inc., Intervenor.

The North American Telephone
Association, Intervenor.

**On Petitions for Review of an Order of
The Federal Communications Commission**

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**Argued September 22, 1975** **Decided April 14, 1976**

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Before HASTIE* and TUTTLE**, Senior Circuit Judges, and WIDENER, Circuit Judge.

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*Senior United States Circuit Judge William H. Hastie of the United States Court of Appeals for the Third Circuit.

**Senior United States Circuit Judge Elbert Parr Tuttle of the United States Court of Appeals for the Fifth Circuit.

Edward B. Hipp, (Maurice W. Horne and Jerry B. Fruitt on brief) for Petitioner North Carolina Utilities Commission in case no. 74-1220; Carl E. Sanders and (Norman L. Underwood on brief) for Intervenor Southeastern Association of Regulatory Utility Commissioners in case no. 74-1220; Thomas J. O'Reilly, (Chadbourne, Parke, Whiteside, and Wolff on brief) for Petitioner United States Independent Telephone Association in case no. 74-1515; (Warren E. Baker, Richard J. Croker and Carolyn C. Hill on brief) for Petitioners Carolina Telephone and Telegraph Company and United Telephone Company of the Carolinas, Inc. in case no. 74-1390; (George D. Gibson, John W. Riely, John H. Shenefield, Gary V. McGowan, F. Mark Garlinghouse, Harold J. Cohen, Charles Ryan, Alfred C. Partoll, Richard Partridge, Hunton, Williams, Gay and Gibson on brief) for Petitioners The Bell System Companies in case no. 74-1449; (Irwin Schneiderman, Donald J. Mulvihill, Laurence T. Sorkin, Joel C. Balsam, Michael J. Klosk, Cahill, Gordon and Reindel on brief) for Petitioner Continental Telephone Corporation in case no. 74-1516; Joseph A. Marino, Associate General Counsel, United States Department of Justice, (Thomas E. Kauper, Assistant Attorney General, Seymour H. Dussman, Attorney, Ashton R. Hardy, General Counsel, John E. Ingle, Counsel, United States Department of Justice, on brief) for Respondent Federal Communications Commission in case nos. 74-1220, 74-1390, 74-1449, 74-1514, 74-1515, and 74-1516; Edwin B. Spievack, (Victor J. Toth, Cohn and Marks, Keller and Heckman on brief) for Intervenors Telerent Leasing Corporation, North American Telephone Association, et al., in case nos. 74-1220, 74-1390, 74-1449, 74-1514, 74-1515, and 74-1516; Charles R. Cutler, (John L. Bartlett, John B. Wyss, Kirkland, Ellis and Rowe, on brief) for Intervenors Aeronautical Radio, Inc. in case nos. 74-1220, 74-1390, 74-1449, 74-1514, 74-1515, and 74-1516; (James E. Landry on brief) for Intervenors Air Transport Association of America in case nos. 74-1220, 74-1390, 74-1449, 74-1514, 74-1515,

and 74-1516; David Anderson, (J. Roger Wollenberg, William T. Lake, Neil J. King, Neal M. Goldberg, Wilmer, Cutler and Pickering, J. Gordon Walter on brief) for Intervenor International Business Machines Corporation (IBM) in case nos. 74-1220, 74-1390, 74-1449, 74-1514, 74-1515, and 74-1516; (Kevin H. Cassidy, James T. Roche, and John M. Scorce on brief) for Intervenor Data Transmission Company in case no. 74-1220; (William H. Borghesani, Jr., Keller and Heckman on brief) for Intervenor National Retail Merchants Association, Inc. in case nos. 74-1220, 74-1390, 74-1449, 74-1514, 75-1515, and 74-1516; (Joseph M. Kittner, Edward P. Taptich, McKenna, Wilkinson and Kittner, John S. Voorhees, Howrey, Simon, Baker and Murchison on brief) for Intervenor-Respondent Computer and Business Equipment Manufacturers Association (CBEMA) in case nos. 74-1220, 74-1390, 74-1449, 74-1514, 74-1515, and 74-1516; (Charles M. Meehan on brief) for Intervenor Utilities Telecommunications Council in case nos. 74-1220, 74-1390, 74-1449, 74-1514, 74-1515, and 74-1516; (Robert E. McKee, David M. Clark, Clark, Tanner and Williams on brief) for Intervenor International Telephone and Telegraph Corporation in case nos. 74-1220, 74-1390, 74-1449, 74-1514, 74-1515 and 74-1516; (Herbert E. Marks, Stephen R. Bell, Wilkinson, Cragun and Barker on brief) for Intervenor Remote Processing Services Section of the Association of Data Processing Service Organizations, Inc. in case Nos. 74-1220, 74-1390, 74-1449, 74-1514, 74-1515, and 74-1516; (Joseph E. Keller, Wayne V. Black, Keller and Heckman on brief) for Intervenor Central Committee on Telecommunications of the American Petroleum Institute in case nos. 74-1220, 74-1390, 74-1449, 74-1514, 74-1515, and 74-1516; (Michael H. Bader, Kenneth A. Cox, William J. Byrnes, John Wells King, Haley, Bader and Potts on brief) for Intervenor MCI Telecommunications Corporation in case nos. 74-1220, 74-1390, 74-1449, 74-1514, 74-1515, and 74-1516; (Herbert E. Forrest, Steptoe and Johnson, Thormund A. Miller and Richard S. Kopf on

brief) for Intervenor Southern Pacific Communications Company in case nos. 74-1220, 74-1390, 74-1449, 74-1514, 74-1515, and 74-1516.

HASTIE, *Circuit Judge*

This controversy began with a petition in which several manufacturers and distributors of communications equipment asked the Federal Communications Commission (hereinafter, FCC or the Commission) to rule that state regulatory agencies are precluded from restricting or regulating the interconnection of customer-provided equipment to the customer's individual subscriber station and line in any way that conflicts with the Commission's regulation of the same subject matter. The petition recited that the North Carolina Utilities Commission had given public notice of a proposed rule to prohibit such connection of customer-provided equipment in that state, except for use exclusively with facilities separate from those used in intrastate communication.[1] It also was alleged that the Attorney General of Nebraska had advised the Nebraska Public Service Commission that rulings of FCC did not control the attachment of customer-provided equipment to telephone facilities used for intrastate communication. The same opinion stated that approval of the state regulatory authority was necessary before a motel could lawfully connect its own internal communications equipment to its telephone subscriber station.

In these circumstances the Commission utilized the proceedings on the equipment manufacturers' petitions to provide the industry, concerned state agencies and the

[1]In adjudicating this controvery, FCC took notice of a somewhat similar regulation recently adopted by the Oklahoma Corporation Commission.

public with a definitive declaratory ruling[2] on the extent to which it asserts and is exercising primary authority, upon which state agencies may not encroach, over the terms and conditions that govern the interconnection of customer-provided equipment to the subscriber's telephone terminal. After adequate notice and consideration of written or oral submissions by some 46 interested parties, the Commission

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[2]We have considered and have found no merit in an argument that the Commission's resort to a declaratory order was premature and unwarranted because state agencies are merely threatening to prohibit or restrict the use of customer-provided terminal equipment and have not yet imposed any such restriction as the proceeding now pending before the North Carolina Utilities Commission is designed to accomplish.

Unlike United States district courts, federal administrative agencies are not restricted to adjudication of matters that are "cases and controversies" within the meaning of Article III of the Constitution. Sections 4(i) and (j) and 403 of the Communications Act confer upon FCC broad power to issue orders appropriate for the performance of its functions under the Act. And section 5(e) of the Administrative Procedure Act, 5 U.S.C. §554(e), provides that an administrative agency such as FCC, "in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty".

In paragraph 22 of its memorandum opinion in this case the Commission has asserted that "[t]he course being pursued by . . . [North Carolina Utilities Commission] and the Attorney General of Nebraska, and possibly other States, is a source of great controversy and confusion for manufacturers and users of customer-provided communications equipment and also casts doubt on the . . . application and effect of . . . tariffs on file with this Commission . . . . We would be remiss in the discharge of our broad statutory responsibilities to remain passive in the face of the policy and regulatory confusion which permeates the entire field of interconnection . . . ." . 45 F.C.C.2d 204, 214. The record amply supports this statement. In this connection, it appears without contradiction that the market for customer-provided communications equipment has expanded rapidly in recent years and now is being affected adversely by the state threat of new restrictions upon interconnections.

We have no doubt that the matters presented in this proceeding were ripe for consideration and appropriate for disposition by declaratory ruling.

issued the order that is now here for review.[3] *In the Matter of Telerant Leasing Corp., et al.*, 1974, 45 F.C.C. 2d 204.

As the agency established by the Communications Act of 1934, 47 U.S.C. §151, to administer the provisions of that statute, the Federal Communications Commission is empowered, in the language of section 1 of the Act,[4] to regulate interstate and foreign commerce in communication by wire and radio "so as to make available . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate faciiities at reasonable charges . . . ." By comprehensive definition of "communication by wire", section 3 makes it explicit that the subject matter of the Commission's jurisdiction includes "all instrumentalities, facilities, apparatus, and services . . . incidental to . . . [interstate] transmission" by wire.

On the other hand, section 2 both restates the applicability of the Act to "all interstate and foreign communications by wire or radio" and specifies that it shall not "be construed to apply to or give the Commission jurisdiction with respect to "(b) (1) . . . facilities or regulations for or in connection with intrastate communication service . . . of any carrier . . . ."

Terminal equipment that is connected to a telephone subscriber's station and line does in fact connect with the national telephone network. Usually it is not feasible, as a matter of economics and practicality of operation, to limit the use of such equipment to either interstate or intrastate transmissions. In paragraph 26 of the decision from which these appeals have been taken, the Commission has described the underlying realities as follows:

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[3]Six petitions for review have been filed in or transferred to this court where they have been consolidated for hearing and decision.

[4]Section 1 of the Act is numbered §151 in the United States Code. Throughout this opinion sections of the Act will be designated by their original numbers.

> ". . . exchange plant, particularly subscriber stations and lines, is used in common and indivisibly for all local and long distance telephone calls. There is no interstate message toll telephone service either offered or practically possible except over exchange plant used for both intrastate and interstate and foreign service". 45 F.C.C. 2d 204, 215.

Although some appellants have expressed disagreement with this finding, we find no basis for challenging it.

It follows that the Commission's present assertion of jurisdiction over the interconnection of customer provided equipment to the nation-wide network unavoidably affects intrastate as well as interstate communication. And, by the same token, both would be restricted by any state action that prevented such interconnection. Thus, the language of sections 1 and 2 that both grants the Commission authority to regulate facilities of interstate communication and withholds authority to regulate facilities of intrastate communication creates the present dispute but, considered alone, does not resolve it.

In these circumstances it is relevant and helpful to consider other provisions of the Communications Act. By force of a heretofore unmentioned concluding clause of section 2(b), not only telelphone companies with lines that extend interstate but also those local companies that provide interstate service solely through connection with the lines of telephone companies that are unrelated to them, are expressly made amenable to the regulatory provisions of sections 201 through 205 of the Act. All of the telephone companies parties to this suit are thus integrated into the national network and subject to the provisions of sections 201 through 205. More particularly, under section 201, charges and practices for and in connection with interstate service must "be just and reasonable". Section 202 makes unlawful any "unjust or unreasonable discrimination in

charges, practices, classifications, regulations, facilities, or services . . . ." Section 203 requires carriers to file with the Commission their tariff schedules for interstate communication service "showing the classifications, practices, and regulations affecting such charges". Sections 204 and 205 prescribe the manner in which the Commission shall administer and implement the requirements of the preceding sections, approving or invalidating tariffs as may be appropriate. It is in connection with the Commission's efforts to discharge its responsibilities under sections 201 through 205 and the alleged frustrating effect of countervailing state action that this controversy about jurisdiction over the attachment of customer-provided equipment has arisen.

Historically, a telephone company's restrictions, requirements and other regulations concerning customer provided equipment have been published and effectuated through inclusion in interstate tariffs. Some years ago, tariffs published by American Telephone and Telegraph Co. (hereinafter, AT&T), acting for itself and other concurring carriers throughout the nation, forbade the subscriber to connect to his line any device or equipment not furnished by the telephone company. As defendant in a consequent anti-trust suit by a manufacturer of a terminal device, AT&T successfully urged that the suit was premature because of the primary jurisdiction of FCC over the question of the lawfulness of the inclusion of this restriction in the controlling tariff.[5] This led to a formal FCC proceeding for determination whether the tariff contained any unreasonable or unlawfully discriminatory restriction.

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[5] *Carter v. AT&T Co.*, N.D.Tex. 1966, 250 F. Supp. 188, 190, *aff'd*, 5th Cir. 1966, 365 F.2d 486, *cert. denied*, 386 U.S. 937. Although litigants, like courts, may experience a change of mind, it is noteworthy that AT&T's present position seems to be that FCC has no jurisdiction, the antithesis of primary jurisdiction, over terminal equipment that is used for both interstate and intrastate communication.

In its ensuing decision the Commission held that the tariff's blanket and unqualified prohibition of the interconnection of customer provided equipment was unreasonable and unjustifiably discriminatory, hence invalid under sections 201 and 202 of the Act. *Carterfone v. AT&T*, 1968, 13 F.C.C. 2d 420, *reconsideration denied*, 14 F.C.C. 2d 571. At the same time the telephone companies were authorized, without any particularizing directive, to file new tariffs regulating the use of customer-provided equipment. They did so, and the Commission reviewed the tariffs and permitted them to become effective. See *In the Matter of AT&T "Foreign Attachment" Tariff Revisions*, 1968, 15 F.C.C. 2d 605, *reconsideration denied*, 18 F.C.C. 2d 871.

The coverage of one of the approved new tariffs, F.C.C. No. 263, which, as subsequently amended, remains in effect, is relevant to the present dispute. It authorizes and regulates the connection and use of customer-provided terminal equipment with telephone company facilities for long distance message communication. It covers both data and voice transmitting and receiving terminal equipment, as well as mechanically attached accessories. Provision also is made for the connection of customer-provided communications systems with the interstate telephone network. At the same time, various safeguards are required. Thus, with few exceptions, the tariff provides that access to the telephone network must be through a telephone company supplied network control signaling unit, which serves as a protective interface. Far from surrendering jurisdiction over alternative means of access, the Commission postponed, pending further engineering and technical study, decision whether and what customer-provided signalling devices should be approved.

If, as North Carolina is formally proposing and the Attorney General of Nebraska has held to be permissible, state jurisdiction over intrastate communication facilities is

exercised in a way that, in practical effect, either prohibits customer-supplied attachments authorized by tariff F.C.C. No. 263 or restricts their use contrary to the provisions of that or any other interstate tariff, the Commission will be frustrated in the exercise of that plenary jurisdiction over the rendition of interstate and foreign communication services that the Act has conferred upon it. The Commission must remain free to determine what terminal equipment can safely and advantageously be interconnected with the interstate communications network and how this shall be done.

We have no doubt that the provisions of section 2(b) deprive the Commission of regulatory power over local services, facilities and disputes that in their nature and effect are separable from and do not substantially affect the conduct or development of interstate communications. But beyond that, we are not persuaded that section 2(b) sanctions any state regulation, formally restrictive only of intrastate communication, that in effect encroaches substantially upon the Commission's authority under sections 201 through 205.[6] In this view of the interrelation of the provisions of the Act, the Commission's declaratory statement of its primary authority over the interconnection

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[6]To support their contentions about the intended effect of section 2(b), the opposing parties have cited particular statements made in Congressional committee reports, or on the floor during debate, or by witnesses during the 1934 Senate and House hearings on the then newly proposed federal communications legislation. These references certainly show concern that, as a result of the so-called *Shreveport* rate decision, *Houston, E.&W. Texas Ry. v. United States*, 1914, 234 U.S. 342, the Interstate Commerce Commission had been able to deprive state authorities of almost all regulatory power over intrastate rail transportation. And there was rather general agreement that this should not be done by the new federal commission in the communications field. However, it is equally clear that such little particularization as appears in the various statements of state concerns focuses upon the desire of state authorities to regulate local telephone rates and charges.

(continued)

of terminal equipment with the national telephone network is a proper and reasonable assertion of jurisdiction conferred by the Act. *Cf. G.T.E. Service Corp. v. F.C.C.*, 2d Cir. 1973, 474 F.2d 724, approving an FCC ruling that prohibited telephone companies, including those that engaged primarily in local exchange service and participated in interstate service only through connection with other unrelated carriers, from engaging in the data processing business.

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[6](continued)

See the statements of Mr. Clardy and Mr. McDonald, both senior officers of the National Association of Railroad and Utilities Commissioners, Hearings on S.2910 before the Senate Committee on Interstate Commerce, 73d Cong., 2d Sess. 155, 156. Of course, rate making typifies those activities of the telephone industry which lend themselves to practical separation of the local from the interstate in such a way that local regulation of one does not interfere with national regulation of the other. Focusing upon this type of local regulation, members of Congress and the witnesses they heard did not discuss the impact, if any, of section 2(b) on the type of regulation we now are considering. However, one of the above mentioned industry wintesses, Mr. Clardy, did make this perceptive comment:

> ". . . [W]e now have a great deal of difficulty in saying what is interstate and what is intrastate property . . . because every exchange and every piece of machinery and all help and everything else, may at any moment be carried over exclusively, temporarily at least, into interstate business. There has got to be some new philosophy developed, perhaps, by this Commission to assist the State commissions in proper determination . . . ." Hearings on H.R. 8301 before the House Committee on Interstate and Foreign Commerce, 73d Cong., 2d sess. 73.

In our view, the legislative history of the Act furnishes no impressive guidance for our determination of the reach of section 2(b). In any event, we are satisfied that it is not inconsistent with the view that the purpose of section 2(b) is to restrain the Commission from interfering with those essentially local incidents and practices of common carriage by wire that do not substantially encroach upon the administration and development of the interstate telephone network.

We are all the more confident of this because, elsewhere in the Act itself, Congress has recognized the existence of areas of common national and state concern and has provided a procedure under which national primacy is recognized, yet the Commission is authorized to receive and consider information, views and proposals from concerned state agencies that may aid it in reaching informed and wise decisions. More particularly, section 410(c) of the Act confers upon the Commission discretionary power to refer any matter "relating to common carrier communications of joint Federal-State concern, to a Federal-State Joint Board" of four state and three federal Commissioners for examination and for preparation of a recommended FCC decision. It even is required that the state members of a Joint Board shall participate, without vote, in the Commission's consideration of the Board's recommendation. We find it very difficult to square this Congressional design with the present contention that section 2(b) is intended to deprive the Commission of jurisdiction over the use of facilities that necessarily serve both interstate and intrastate communications. We think the Commission has acted properly in this case by resolving the challenge to its jurisdiction and at the same time proceeding separately, as it has,[7] to utilize the Joint Board procedure as an aid to sound resolution of interconnection problems that emerge in this period of developing technology and increasing demand.

It also is significant that for many years FCC, rejecting the argument that section 2(b)(1) deprives it of control over terminal facilities and equipment used in connection with both interstate and intrastate communications, has repeatedly exercised such jurisdiction. As early as 1947,

[7]See Interstate and Foreign MTS and WATS, Docket 1958, initiated 35 F.C.C. 2d 539, 543 and broadened by supplementary orders. See also the pending inquiry as to economic implications of customer interconnection policies at Docket 20003, F.C.C. 74-344, April 1974.

FCC directed telephone companies to file tariff regulations that would permit the connection of recording devices to telephone receivers under specified conditions. *Use of Recording Devices*, 11 F.C.C. 1033. For present purposes, the significant circumstance is that in its opinion the Commission discussed and rejected a contention of the Bell Systems that "facilities which are used for interstate and intrastate services are excluded from the Commission's jurisdiction as 'facilities . . . for or in connection with intrastate communication', as that term is used in Section 2(b)(1) of the Communications Act". 11 F.C.C. at 1046. A subsequent opinion pointed out that "[w]ere the Commission to exercise its jurisdiction only where the telephone facilities in question were exclusively interstate in character, it would result in virtually complete abdication from the field of telephone regulation . . . ." *Katz v. A.T.&T.*,- 1953, 43 F.C.C. 1328, 1332, 8 Pike & Fischer Radio Reg. 919, 923.

More recent decisions also regulate terminal facilities or attachments used in both intrastate and interstate commerce. *E.g., United States Department of Defense v. General Telephone Co.*, 1973, 38 F.C.C. 2d 803, *aff'd.* F.C.C. No. 73-854; *AT&T—TWX*, 1965, 38 F.C.C. 1127, 1133; *AT&T—Railroad Interconnections*, 1962, 32 F.C.C. 337; *Hush-A-Phone Corp. v. AT&T*, 1957, 22 F.C.C. 112.

Congress cannot have been unaware that for some 30 years FCC has viewed and treated section 2(b)(1) of the Act as imposing no bar to its exercise of jurisdiction over facilities used in connection with both intrastate and interstate telephone communications. Significantly, it was as recently as 1971 that Congress amended the Act by adding the present section 410(c)[8] with its discretionary Joint Federal-State Board procedure that already has been discussed. We think it likely that Congress would have

[8]Pub.L. 92-131, 85 *Stat.* 363.

taken quite different action to restrict the Commission's jurisdiction and assure state primacy if, in its view, the Commission had long and repeatedly been exceeding its jurisdiction and impinging upon an area which Congress had intended for exclusive state control.[9]

One additional contention merits brief discussion.[10] Some of the petitioners argue that the Commission's action in this case violates a jurisdictional limitation imposed by section 221 of the Act which provides in part:

> "(b) . . . [N]othing in this Act shall be construed . . . to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire . . . exchange service, . . . even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State commission or by local governmental authority."

For present purposes it suffices to point out that the legislative history indicates that this restriction is intended to do no more than to prevent the circumstance that a single telephone exchange serves an area that include parts of more than one state from enlarging the jurisdiction of

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[9]The Senate Committee Report on this bill, S.Rep. No. 92-362, 92d Cong., 1st Sess., makes it clear that need for the proposed new section 410(c) procedure grew out of the circumstance that, while the "Federal Government regulates interstate carrier services [and] . . . the States exercise jurisdiction over intrastate toll and local exchange services, the plant facilities are to a great extent the same for both. The household telephone instrument, for example, is the same whether the call is made intrastate or interstate". 2 U.S. Code Cong. & Adm. News, 92d Cong. 1st Sess., 1971, at 1511.

[10]All other points made by any petitioner and not discussed in this opinion have been considered and found to lack merit.

FCC over the business and facilities of that exchange.[11] To put the matter affirmatively, by force of section 221(b) a local carrier that serves a single multi-state exchange area is assured whatever degree of freedom from federal regulation section 2(b) provides for uni-state carriers and intrastate telephone business generally.

In sum, all of the foregoing considerations make appropriate for this case Judge (now Chief Justice) Burger's admonition that the Communications "Act must be construed in light of the needs for comprehensive regulation and the practical difficulties inhering in state by state regulation of parts of an organic whole". *General Telephone Co. of California v. F.C.C.*, D.C. Cir. 1969, 413 F.2d 390, 398, *cert. denied*, 396 U.S. 888.

The Commission's Memorandum Opinion and Declaratory Order are sustained as reasonable administrative action within its statutory jurisdiction.

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[11] Mr. Rayburn, presenting the 1934 bill on the floor of the House, explained that section 221(b) "is designed to cover cases of cities located within two States, as Texarkana". 78 Cong. Rec. 10314. Similarly, on the Senate floor, Senator Dill, explaining the reach of the amendment, cited the uncertain status of metropolitan Washington and New York areas as essentially local exchanges that crossed state lines. 78 Cong. Rec. 8823. The Committee reports in both the Senate and the House are explicit in saying that section 221(b) is intended to enable state commissions "to regulate exchange services in metropolitan areas overlapping State lines". S.Rep. No. 781, 73rd Cong. 2d Sess., 5; H.R. Rep. No. 1850, 73rd Cong., 2d Sess., 7.

WIDENER, Circuit Judge, concurring and dissenting:

I respectfully dissent from that part of the court's opinion which determines that the FCC has primary jurisdiction over the interconnection of customer-provided equipment to the subscriber's telephone terminal. Should the statutory jurisdictional hurdle be overcome, I would concur in the balance of the opinion.

During the hearings before the House Committee on Interstate and Foreign Commerce and the Senate Committee on Interstate Commerce, it was repeatedly pointed out that § 221(b), 47 USC § 221(b), was included in order to protect the jurisdiction of the States over intrastate telephone communications. This section, an intentional subtraction from the then existing power of the Interstate Commerce Commission, was designed to overcome the effects of the *Shreveport* rate case, 234 US 342 (1914), so far as telephone communications were concerned. See Statement of Dr. Irvin Stewart, member of the interdepartmental committee on communications, Hearings on H.R. 8301 before the House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess. 12, 16-18 (1934) (hereinafter House Hearings); statement of F.B. MacKinnon, President of the United States Independent Telephone Association, House Hearings 248; statement of K.F. Clardy, Chairman of the Legislative Committee of the National Association of Railroad and Utilities Commissioners, House Hearings 74; statement of Andrew R. McDonald, National Association of Railroad and Utilities Commissioners, Hearings on S. 2910 before the Senate Committee on Interstate Commerce, 73d Cong., 2d Sess. 156 (1934) (hereinafter Senate Hearings).

Congress was well aware that at that time 98% of telephone communications was intrastate. 78 Cong. Rec. 10316 (1934). The FCC states 97% of messages are now intrastate. *Telerent*, Memo Opinion, p. 11. The House Com-

mittee was told that every piece of equipment and every exchange could at any moment be used exclusively, although temporarily, in interstate commerce. See statement of K.F. Clardy, House Hearings 73. This condition is the same today.

State regulatory commissions expressed themselves in favor of the Act because they understood it to safeguard the states from usurpation of power by the FCC. See statement of K.F. Clardy, House Hearings 71-72.

As Senator Dill, Chairman of the Senate Committee, pointed out in response to Mr. Clardy's statements, "The reason why the State representatives of the State commissions wanted this language [§ 221(b)] in addition to the language of the Interstate Commerce Act — and that has been hopped on, talked about a great deal here, that we have added some language — is that the interpretation placed upon the language of the Interstate Commerce Act in connection with railroads has gone so far that the State commissions fear that this commission, using the same language — that if the same language is used in the law they might override and interfere with State regulations." Senate Hearings 154.

It was even argued in the Senate Hearings that the bill should be changed to provide for Federal regulation of all facilities used for interstate communication, in order to correspond with the then existing railroad regulation. See Statement of Edward N. Nockels, Legislative Representative of the American Federation of Labor, Senate Hearings 199. Mr. Nockels pointed out that the Act takes away from Federal regulation a large portion of the existing power of the Interstate Commerce Commission. Despite this argument, the wording of the bill remained unchanged, and the taking away of the then existing jurisdiction of the ICC was effected by § 221(b).

In discussing § 221, both the House Report and the Senate Report accompanying S. 3285 state in the same words "Paragraphs (b), (c), and (d) conform to the recommendations of the State commissions, and will enable those commissions, where authorized to do so, to regulate exchange services in metropolitan areas overlapping State lines." House Report p. 7, Senate Report p. 5.

Senator Dill, Chairman of the Senate Committee on Interstate Commerce, when introducing the bill on the floor of the Senate, pointed out the intent of the bill "to reserve to the State commissions the control of intrastate telephone traffic. *We have kept in mind the fact that the Interstate Commerce Commission, through the Shreveport decision and the decisions in other similar cases, has gone so far in the regulation of railroads that the so-called 'State regulation' amounts to very little . . . . [T]he State commission representatives were jealous, in the preparation of this bill, that those rights should be protected; and we have attempted to do that.*" 78 Cong. Rec. 8823 (1934) (Italics added).

Likewise, Representative Rayburn, Chairman of the House Committee on Interstate and Foreign Commerce, when introducing the bill, stated, "Paragraph (b) [of § 221] leaves local exchange service to local regulation even where a portion of such local exchange service constitutes interstate communications." 78 Cong. Rec. 10314 (1934). While it is true both the House and Senate Reports, and both Rep. Rayburn and Sen. Dill indicated that § 221 would take care of the situation where cities are located within two states, the section was incorporated at the request of State commissions, and embodied language which encompassed concerns of the State commissions and of Congress beyond the mere overlapping of telephone exchanges of cities into more than one State. The broad language of § 221(b) bears this out:

> "(b) Subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof, even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State commission or by local governmental authority."

I suggest the legislative history does not indicate that this language should be construed to apply only to cities which overlap state lines, rather the fact that the language was included at the vigorous request of the State commissions indicates that the section should be read literally and to deny the FCC jurisdiction over intrastate facilities even though incidentally used in interstate commerce. As Representative Rayburn pointed out, this law does "not apply to a telephone receiving set, or anything like that." House Hearings 179.

That the statute should be read literally has been affirmed by the FCC in more recent pronouncements. In 1954, language was added to the statute to include in it "mobile, or point-to-point radio telephone exchange service." The legislative history of this amendment is quite enlightening. See 1954 U.S. Code, Congressional and Administrative News, p. 2133, et seq.

The Senate Report on the bill states in a separate subheading styled "PURPOSE," "The purpose of the legislation is to clarify the provisions of the Federal Communications Act with regard to the jurisdiction of the Federal Communications Commission over telephone and telegraph companies which are engaged primarily in in-

trastate activities and which therefore should be subject to State and local regulation rather than Federal regulation. . . . The legislation is designed to make certain that the use of radio will not subject to Federal regulation companies engaged primarily in intrastate operations." The factual problem which brought about the legislation was the installation of mobile telephones in vehicles, farm houses in rural communities, isolated business developments, seasonal resort areas, etc. While stating that the Justice Department made no recommendation as to whether or not the amendments should be passed, the Deputy Attorney General, in an official communication to the Chairman of the Senate Committee on Interstate and Foreign Commerce, stated, as a construction of the legislation, that "[t]he purpose of the measure is to make certain that the use of radio in the communication service by telephone and telegraph companies which are engaged primarily in intrastate activities will not subject them to the jurisdiction on the Federal Communications Commission."

Of equal or greater interest and authority is the official comment of the Federal Communications Commission to an official inquiry from the Senate Committee on Interstate and Foreign Commerce found at p. 2135-6 of U.S. Code, Congressional and Administrative News, 1954. Among other comments, the Commission stated ". . . it would be clear that the Commission would not have regulatory jurisdiction over the services in question had they in fact been conducted by wire." p. 2136. This is not only a letter from the Chairman of the Commission;[1] it is the act of the Commission itself construing the statute with which we are immediately involved, and was adopted by the Commission December 18, 1953.

[1] An official letter from the Chairman of the FCC to the Chairman of the Senate Sub-Committee on the Handicapped, who had inquired whether the FCC required the hearing aid industry to provide equipment for the coupling of hearing aids to telephone instruments was to

(continued)

We are faced with the situation, as I see it, that the FCC, from 1934 until 1974, construed the statute in question so that it did not have jurisdiction to regulate attachments to intrastate facilities which were subject to State regulation as provided for under § 221(b) of the statute. Certainly, the great weight given an administrative construction of a statute by its administrator must weigh heavily against the position the FCC now takes. Its change of position, after 40 years of construction of the statute denying its own jurisdiction, furnishes no reason to read the statute other than literally and consistently with the construction given to it by Congress at the time it was enacted and by the agency itself for years thereafter.

I think, then, that the statute, § 221(b), means at the least that Congress provided for State regulation of the services, facilities, etc., as mentioned therein as were at that time subject to State regulation, "even though" in the words of the statute[2] the services or facility might incidentally be used in interstate communication as in an exchange astride a State line.[3]

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[1](continued)

the same effect as the comment on the 1954 amendment. It stated the Act excluded the FCC from "any authority," and that "such local service matters are subject to the regulatory authority of State commissions in the various States." 119 Cong Rec. S 17297, daily ed., Sept. 22, 1973.

[2]Interestingly enough, see the use of the words "even though" used in a colloquy between F.B. McKinnon, President of the Independent Telephone Association, and the House Committee in the hearings, which corroborates the construction sought by the petitioners here. House Hearings, p. 248. No reason is presented to my satisfaction not to give the words their ordinary meaning.

[3]The facility involved here admittedly has been subject to State regulation.

I submit the intent of Congress was to establish a regulatory scheme for telephone companies, which envisioned a system of *divided jurisdiction*, Federal *or* State, rather than a system of *primary jurisdiction*, Federal *then* State, and that the jurisdiction of the State regulatory authorities was intended to be regulated by Congress, not by the whim of the Federal Communications Commission. While the power of Congress to regulate commerce under the Constitution has not been doubted since *Gibbons v. Ogden*, 9 Wheat. 1 (Feb. term 1824), that opinion itself points out that Congress may entirely legitimately manifest ". . . an intention to leave this subject entirely to the States until Congress should think proper to interpose." p. 208.

No more reason exists for a federal regulatory commission to assert jurisdiction it does not have than exists for a federal court to do so. It should have ". . . no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given." *Cohens v. Virginia*, 6 Wheaton 264, 404 (Feb. term 1821). The FCC here not only, or even principally, usurps the regulatory authority of the States; it usurps the right of Congress to provide for regulatory jurisdiction.

While the opinion of the court may seem to relegate the precise question of the statutory jurisdiction of the FCC to almost an afterthought, I think it is the most important and very nearly the only issue of real consequence in the case. Jurisdiction carries with it the right to regulate revenue — not only the amount, but who gets it, and its source. Depriving the States of jurisdiction deprives them of the right to regulate, which in turn deprives them of the right to distribute the burden of telephone service among the various classes of customers. As a practical matter, this assertion of federal primacy necessarily and directly affects the intrastate rates which may be charged, jurisdiction of which could not be more clearly reserved to the States. The

result we arrive at, then, I suggest was never dreamed of by Congress.

Today, we allow the FCC to regulate only a facility mentioned in the statute as reserved for State regulation, but by approving the principle, we establish precedent of affirming FCC regulation of those matters mentioned in § 211(b) as reserved to the States. No reason would then exist for the FCC not to regulate "charges, classifications, practices, [and] services," other matters specifically reserved for State regulation by the same statute, and it must now be taken as the law that any continued State regulation of "charges, classifications, practices, [and] services" is by grace of the Federal Communications Commission, not by act of Congress, for we have approved the principle of FCC assertion of primary jurisdiction.

While there may be no doubt that Congress had the power to grant the FCC jurisdiction over intrastate facilities that are used incidentally in interstate commerce, such as the inter-connection of customer provided equipment involved here, as I read the statute and legislative history, Congress specifically declined so to do in the face of some who argued that it should.[4] As Congress did not confer jurisdiction on the Federal Communications Commission, it is not for us to consider whether it should have then, or whether it should now. I think it has not, and any change in the jurisdictional regulatory scheme is a matter for Congress and not for the courts.

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[4]While the opinion of the court relies in part on the creation and existence of the federal-state joint board, a recent decision of the FCC illustrates the utter futility of relying on the FCC to heed the advice of the joint board that had attempted to protect the telephone companies from detrimental economic effect through revenue losses directly brought about by FCC assertion of jurisdiction over attachments to telephone systems. *In the Matter of Proposals for New or Revised Classes of Interstate and Foreign Message Toll Telephone Service (MTS) and Wide Area Telephone Service* (WATS), FCC Docket 19528 (March 18, 1976).

## APPENDIX B

## UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

**Nos. 74-1220; 74-1390; 74-1449; 74-1514; 74-1515; 74-1516**

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**No. 74-1220**

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|---|---|
| The North Carolina Utilities Commission | Petitioner, |
| v. | |
| Southeastern Association of Regulatory Utility Commission | Intervenor. |
| v. | |
| The Federal Communications Commission and the United States of America, | Respondents. |
| International Telephone and Telegraph Communications, | Intervenor. |
| Southern Pacific Communications Company, | Intervenor. |
| Data Transmission Company, | Intervenor. |
| National Retail Merchants Association, Inc., | Intervenor. |
| International Business Machines Corporation, | Intervenor. |
| Southeastern Association of Regulatory Utility Commissioners, | Intervenor. |
| Computer and Business Equipment Manufacturers Assoc. (CBEMA), | Intervenor. |

Utilities Telecommunications Council, Intervenor.

MCI Telecommunications Council, Intervenor.

Telerent Leasing Corporation; Crescent Industries, Inc.; Long Engineering Company; Petty Communications, Inc.; Tele-Sound Company, Inc.; Telephone Interconnect Company; North American Telephone Association, Intervenor.

Central Committee on Communication Facilities of the American Petroleum Institute, Intervenor.

Remote Processing Services Section of the Association of Data Processing Service Organizations, Inc., Intervenor.

Aeronautical Radio, Inc.; Air Transport Association of America, Intervenor.

**No. 74-1390**

Carolina Telephone and Telegraph Company and United Telephone Company of the Carolinas, Inc., Petitioners,

versus

Federal Communications Commission and the United States of America, Respondent.

National Retail Merchants Association, Inc., Intervenor.

The North America Telephone Association, Intervenor.

**No. 74-1449**

American Telephone and Telegraph Company and Associated Bell System Companies, Petitioners,

versus

Federal Communications Commission and The United States of America, Respondents.

National Retail Merchants Association, Inc., MCI Telecommunications Corporation, and Southern Pacific Communications Company, Intervenors.

Telerent Leasing Corp.; Crescent Industries, Inc.; Long Engineering Company; Petty Communications, Inc.; Tele-Sound Company, Inc.; North American Telephone Association Intervenor.

**No. 74-1514**

National Association of Regulatory Utility Commissioners, Petitioner,

versus

Federal Communications Commission and United States of America, Respondents.

and

Southern Pacific Communications Company, MCI Telecommunications Corporation, The National Retail Merchants Association, Inc., and North American Telephone Association, Intervenor.

**No. 74-1515**

United States Independent Telephone Association, Petitioner,

versus

Federal Communications Commission,
and United States of America, Respondents.

and

Southern Pacific Communications Company,
MCI Telecommunications Corporation,
The National Retail Merchants Association
Inc., and Telerent Leasing Corporation,
et al, Intervenor.

**No. 74-1516**

Continental Telephone Corporation, Petitioner,

versus

Federal Communications Commission
and United States of America, Respondents.

MCI Telecommunications Corp., Intervenor.

National Retail Merchants
Association, Inc., Intervenor.

The North American Telephone
Association, Intervenor.

**On Petitions for Review of an Order of
The Federal Communications Commission**

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**Argued September 22, 1975** **Decided April 14, 1976**

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Before HASTIE* and TUTTLE**, Senior Circuit Judges, and WIDENER, Circuit Judge.

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## ORDER

Certain of the parties have filed petitions for rehearing on account of the opinion in this court filed in these cases April 5, 1976, and decided April 14, 1976, and one of the petitions requests rehearing en banc.

I

As a member of the panel and as a circuit judge in regular active service, Judge Widener requests a poll of the court on the petition for rehearing en banc and votes for it. All other five judges in regular active service being disqualified in these cases, it is not possible to obtain a majority of the judges in regular active service to order a rehearing en banc. FRAP 35(a).

It its accordingly ORDERED that rehearing en banc is denied.

II

The panel has considered the petitions for rehearing. Judge Hastie died immediately subsequent to the filing of this opinion. Judge Widener votes for rehearing. Judge Tuttle votes against rehearing.

It is accordingly ORDERED that rehearing of the cases by the panel is denied by an evenly divided court.

III

The court, on its own motion, stays the mandate in these cases for a period of thirty days from the day this order is filed.

With the concurrence of Judge Tuttle.

/s/ H.E. Widener

For the Court

## APPENDIX C

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554 FCC 74-109
10018

In the Matter of

TELERENT LEASING CORPORATION, et al.

Petition for Declaratory Rulings on questions of Federal Pre-emption on regulation of interconnection of subscriber-furnished equipment to the nationwide switched public telephone network — **Docket No. 19808**

### MEMORANDUM OPINION AND ORDER

Adopted: January 31, 1974; Released; February 5, 1974

By the Commission:

1. By Memorandum Opinion and Order released on September 7, 1973 (FCC 73-901) we instituted this proceeding, pursuant to Sections 4(i), 4(j), and 403 of the Communications Act and Sections 1.1 and 1.2 of our Rules, to afford interested persons an opportunity to submit briefs and oral argument on the question of whether and to what extent the actions taken by the Commission on interconnection of customer-provided communications equipment to the nationwide switched public telephone network have pre-empted state action in this area. Our action was prompted by a petition for declaratory rulings filed on August 8, 1973 by North American Telephone Association (NATA), a trade association, and a number of its members in North Carolina and Nebraska, engaged in the manufacture, distribution, leasing, sale, installation and maintenance of communications terminal equipment

and systems for connection with the switched telephone network. That petition, in turn, was occasioned by recent actions of the States of North Carolina and Nebraska.

2. On June 29, 1973 the North Carolina Utilities Commission gave notice of a proposed rule (R9-5) which would generally prohibit interconnection of customer-owned or customer-provided equipment to the communications system of any telephone company doing business in North Carolina. Under the proposed rule, any such telephone company could provide such interconnection for interstate services only over facilities distinct and separate from those used for intrastate services. By letter dated July 18, 1973 to the Nebraska Public Service Commission, the Attorney General of Nebraska rendered an advisory opinion that our *Carterfone* decision (13 FCC 2d 420; reconsideration denied, 14 FCC 2d 571 (1968)) did not prevent a telephone company from prohibiting interconnection of customer-provided equipment for intrastate use. He also advised, in effect, that a hotel or motel could not interconnect privately-owned communications equipment with a telephone company without certification as a common carrier by the Public Service Commission upon a finding that the telephone company in the area had refused or failed to provide adequate service.

3. In our Order of September 7 herein, we stated our opinion that "the above described advisory opinion of the Attorney General of the State of Nebraska and Rule R9-5 proposed by the North Carolina Utilities Commission have created uncertainty concerning whether and, if so, to what extent actions we have taken, and policies we have promulgated, in *Carterfone* and related cases with respect to interconnection of customer-provided communications equipment to the nationwide switched public telephone network have pre-empted State action in this area." Such actions and policies may be summarized briefly as follows:

**Carterfone and Related Cases**

4. Our *Carterfone* decision (13 FCC 2d 420) involved a device used to interconnect mobile radio systems to the interstate and foreign message toll telephone system. We found that the Carterfone device filled a need, that its use did not adversely affect the telephone system, and that its use was nevertheless prohibited by provisions in an American Telephone and Telegraph Company (AT&T) tariff for interstate service. We held that the AT&T tarrif was unreasonable and unlawful within the meaning of Section 201(b) of the Communications Act in that it prohibited the use of interconnecting devices which do not adversely affect the telephone system. In so holding we relied on *Hush-A-Phone Corp. v. U.S.*, 99 U.S. App. D.C. 190, 193, 238 F.2d 266, 269 (D.C. Cir. 1956), holding that an AT&T tariff prohibition of a customer-supplied "foreign attachment" was an "unwarranted interference with the telephone subscriber's right reasonably to use his telephone in ways which are privately beneficial without being publicly detrimental." See also *Hush-A-Phone Corp. et al. v. AT&T*, 22 FCC 112 (1957). In *Carterfone* we did not prescribe the terms of a new tariff, but left that to the initiative of the telephone companies, pointing out that they were in no wise precluded from adopting reasonable standards to prevent harmful interconnection. In denying reconsideration, we recognized that the economic effects of interconnection upon the carriers' rate structure might well be a pertinent public interest question, but found no substantial showing in the record to demonstrate economic harm (14 FCC 2d 571, 572-573).

5. As a result of our *Carterfone* decision, AT&T filed new and revised tariffs, presently in effect, which permit the interconnection and use of customer-provided terminal devices or communications systems to the telephone message toll and exchange network subject to certain conditions. One such condition is that any network control

signalling unit (NCSU) must be furnished, installed and maintained by the telephone company (except for certain military installations and remote or hazardous locations). In our decision permitting such tariffs to go into effect without formal investigation or hearing, we held that the tariff bar against any customer providing his own NCSU in connection with telephone company facilities was not in conflict with our *Carterfone* ruling, which dealt with interconnections and not replacements of any part of the telphone system. *AT&T "Foreign Attachment" Tariff Revisions*, 15 FCC 2d 605, 609-610 (1968) reconsideration denied, 18 FCC 2d 871, 872 (1969). Similarly, we have held that the present restrictions in the interstate tariffs for message toll telephone service (MTS) and wide area telephone service (WATS) against customers providing interconnection arrangements (CA's) for direct connection of customer-provided equipment (e.g., electrocardiograph, telephotograph and recording devices) to the telephone system also did not violate our *Carterfone* decision. See *Interstate and Foreign MTS and WATS*, 35 FCC 2d 539, 542.

6. In our decision permitting the AT&T tariff to go into effect, we instituted informal proceedings to obtain technical and operational data to assist our evaluation of the public interest factors involved in possible liberalizing revisions of NCSU and CA provisions of the tariffs for MTS and WATS (15 FCC 2d at 610-611, 18 FCC 2d at 872). We also contracted with the National Academy of Sciences (NAS) and Dittberner Associates to conduct technical studies on the question of whether such revisions are technically feasible in view of our concern that the telephone network be protected from harm. The reports submitted to us by NAS and Dittberner, and numerous comments from interested persons, indicated that consideration should be given to revisions in MTS and WATS offerings under a standards and enforcement program that would protect the telephone network from three types of harm: (a) protection from excessive voltage and signal

levels, (b) improper network signalling and (c) line imbalance. Accordingly, we created two advisory committees, pursuant to Executive Order 11007, to study the possibilities of initiating such a standards program for certain selected classes of equipment, namely, customer-provided PBX's, automatic dialers and recording and answering devices. *Interstate and Foreign MTS and WATS*, 35 FCC 2d 539, 540 (1972).

7. On June 14, 1972 we instituted a formal proceeding (Docket No. 19528) to determine whether and with what terms, conditions or limitations the interstate MTS and WATS tariffs should be revised or the Commission should adopt rules to permit customers for switched telephone network services to have the option of providing their own NCSU and CA in lieu of those now provided by the telephone companies. We convened a Federal-State Joint Board pursuant to Section 410(c) of the Communications Act to submit recommendations to us in this matter, stating *(Interstate and Foreign MTS and WATS*, 35 FCC 2d at 541):

> We believe that special procedures are required for the reason that any action that we might take herein to provide the optional MTS or WATS services as heretofore described would appear to require, as a practical matter, that complementary changes be made in the offerings of local telephone exchange and intrastate toll services. For example, if this Commission should decide that, insofar as interstate or foreign MTS and WATS are concerned, the telephone companies should allow customers the option of providing their own network control signalling units for those provided by the telephone companies, implementation of such a decision would require, as a practical matter, that the same options are also available in connection with local

> exchange and intrastate MTS and WATS. This is because almost all such units are used in common for both interstate and local and intrastate communications. Accordingly, we believe that we should not undertake the final resolution of the issues herein without the closest coordination and cooperation between this Commission and state regulatory agencies which have regulatory responsibility for local and intrastate communications services. Therefore, we shall refer these proceedings to a Federal-State Joint Board pursuant to Section 410(c) of the Act.

8. We also made clear that the Joint Board proceeding does not look toward any modification of our *Carterfone* holding, but rather is to determine whether there is a public need to go beyond what we ordered in *Carterfone*, stating (35 FCC 2d at 542):

> We believe that the soundness of our *Carterfone* decision has been amply demonstrated. New markets have been opened to the innovative enterprise of many companies; the public has benefitted from having a wide range of choices available when the individual user selects the terminal device or private system which will best serve his particular communications need; and there has been no actual demonstrable harm to the telephone system or its users. Accordingly, this proceeding will not be concerned with any question relating to whether or not modifications should be made in that decision or in any of the provisions in the interstate MTS and WATS tariff provisions filed in compliance therewith. Our proceeding herein is concerned with the pending and unresolved basic issues now before us as to whether, and to what extent, there is a public need to go beyond what we ordered in *Carterfone*

and permit customers to provide, in whole or in part, the aforementioned NCSU's and CA's in interstate MTS and WATS and, if so, what terms and conditions should apply to protect the telephone system and services of others.

**Positions of the Parties**

9. Pursuant to our Order of September 7, 1973 herein, interested persons filed comments on October 1 and reply comments on October 23, 1973. Oral argument before the Commission *en banc* was held on October 30, 1973.* The positions of various parties may be summarized briefly as follows:

**Petitioners NATA et al. and those supporting their position**

10. Petitioners NATA *et al.* claim that the North Carolina proposed Rule R9-5 and the Nebraska advisory ruling (*supra*, paragraph 2), are in conflict with *Carterfone* and present a threat to the federally declared right of telephone users to provide their own interstate interconnection devices. Because there is no interstate message toll service offered except over equipment used for both interstate and intrastate service, a state prohibition against interconnection would require carriers providing interstate service in the state to take action contrary to existing interstate tariffs, in violation of the Communications Act and federal law. Moreover, the lack of separate intrastate and interstate telephone facilities dictates that Commission regulation in this area must be ex-

*The "Motion to Correct Transcript of Oral Argument", filed by the National Association of Regulatory Utility Commissioners, is hereby granted, as well as that filed by Southern Pacific.

clusive in order to ensure uniform treatment of all customers nationwide. A Commission ruling now on the basic issue of jurisdiction is appropriate and desirable to remove the uncertainty created by the North Carolina and Nebraska actions—an uncertainty which questions the integrity of *Carterfone* and the pending Federal-State Joint Board proceeding (Docket No. 19528) and which has caused a decline in the market for interconnect equipment in North Carolina and Nebraska. Petitioners request the Commission to reaffirm *Carterfone* and the right of users to interconnect communications equipment and systems in accordance with applicable interstate tariffs, to declare federal superintendence in the area of interstate interconnection, and to make more explicit its preemption of such interconnection matters from inconsistent and burdensome state regulations and actions.

11. The views of the petitioners are supported by other manufacturers of interconnect equipment,[1] users of customer-provided terminal equipment and their representatives,[2] various specialized common carriers,[3] and the Department of Justice. They urge that the Commission has comprehensive jurisdiction over interstate and foreign communications under Sections 1, 2(a), 3(a) and (b), 201-205,

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[1] E.g., Computer and Business Equipment Manufacturers Association; General Electric Company; Electronic Industries Association; Ericsson Centrum, Inc.; Phone-Mate, Inc.; International Business Machines Corp.; Independent Data Communications Manufacturing Association; International Telephone and Telegraph Corp.

[2] E.g., Aeronautical Radio, Inc. and Air Transport Association of America; American Petroleum Institute; Computer Timesharing Services Section; Utilities Telecommunications Council; Association of American Railroads; National Retail Merchants Association, Inc.

[3] E.g., Microwave Communications, Inc. and MCI Telecommunications Corp.; Data Transmission Company; Southern Pacific Communications Company; N-Triple-C, Inc.

and 410(c) of the Communications Act,[4] including jurisdiction to regulate interconnection of customer-provided equipment with common carrier facilities capable of interstate service even though the facilities are used also for intrastate service.[5] The Commission's decision in *Carterfone* and the interstate tariffs filed pursuant thereto establish the existence of a definite and positive federal policy on interconnection which pre-empts this area from conflicting state regulation.[6] Indeed, Congress recently

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[4] In support of the Commission's comprehensive authority over interstate communications, Justice and other parties cite:

*General Telephone Co. of California v. FCC*, 413 F.2d 390, 398 D.C. Cir. (1969), *cert. den.* 396 U.S. 888; *United States v. Midwest Video Corp.*, 406 U.S. 649, 659-70 (1972); *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968); *General Telephone Co. of Southwest v. United States*, 449 F.2d 846, 853-55 (5th Cir. 1971); *Ivy Broadcasting Co. v. AT&T*, 391 F.2d 486 (2d Cir. 1968); *United States v. AT&T*, 57 F. Supp. 451, 454 (S.D. N.Y. 1944), affirmed *sub nom Hotel Astor Inc. v. U.S.*, 325 U.S. 837 (1945)' *Ambassador, Inc. v. United States*, 325 U.S. 317, 323 (1945).

[5] In support of FCC jurisdiction over equipment used for interstate communication, even though also used for intrastate, parties cite:

*AT&T—Railroad Interconnections*, 32 FCC 337, 339 (1962); *Fallon Travelodge v. Churchill County Telephone and Telegraph system*, 14 FCC 2d 972 (1968); *Use of Recording Devices*, 11 FCC 1033, 1047 (1947); *Jordaphone Corp. of America v. AT&T*, 18 FCC 644 (1954); *Hush-A-Phone Corp. v. AT&T*, FCC 55-1242 (1955) 22 FCC 112, 113 (1957); *U.S. Department of Defense v. General Telephone Co.*, 38 FCC 2d 803, 807-814 (1973), aff'd FCC 73-854; *AT&T—TWX*, 38 FCC 1127, 1133 (1965); *Katz v. AT&T*, 8 RR 919 (1953); *Colorado v. United States*, 271 U.S. 153 (1926); *GTE Service Corp. v. FCC*, 474 F.2d 724, 736 (2d Cir., 1973); *Chastain v. AT&T*, FCC 73-791 (1973).

[6] For the proposition that the FCC's exercise of jurisdiction pre-empts conflicting or inconsistent state regulation, the parties cite, *inter alia:*

(cont'd)

recognized the Commission's inherent pre-emptive authority over interstate/intrastate facilities when it amended Section 410 of the Act to require that a Federal-State Joint Board be consulted in separation matters and to permit a Joint Board to consider other common carrier matters of joint interest. The Senate Report on this amendment, noting that common plant facilities are used for interstate and intrastate telephone calls, stated that in assigning the cost of this plant for rate making purposes "the Federal Government preempts the States in the area of Federal jurisdiction." (S. Rept. No. 92-303, 92 Cong., 1st Sess. (1971).) The Department of Justice asks the Commission to make clear that all carriers are and will remain subject to all FCC rulings and tariffs pertaining to interconnection regardless of any purported state rulings to the contrary and would be liable under federal law for failure to abide by FCC rulings and tariffs.

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[6] (cont'd)

*Houston, East/West & Texas Ry. v. United States*, 234 U.S. 342 (1914)—the "Shreveport Rate Cases"; *Southern Ry. Co. v. Reid*, 222 U.S. 424 (1912); *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945); *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963); *Head v. New Mexico Board*, 374 U.S. 424, 430 (1963); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *United States v. New York Central R.R.*, 272 U.S. 457, 463-464 (1926); *Farmers Educ. & Cooperative Union v. WDAY, Inc.*, 360 U.S. 525, 531-35 (1959); *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 130-32 (1945); *Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973); *Rice v. Chicago Bd. of Trade*, 311 U.S. 247, 253-254 (1947); *Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (8th Cir. 1971), aff'd, 405 U.S. 1035 (1972); *Smith v. Illinois Bell Tel. Co.*, 282 U.S. 133, 148-149 (1930); *Castle v. Hayes Freight Lines, Inc.*, 348 U.S. 61 (1954); *Carter v. AT&T*, 250 F. Supp. 188 (D.C. Tex. 1966); *FPC v. Transcontinental Gas Pipeline Corp.*, 365 U.S. 1, 19 (1961); *FPC v. Louisiana Power and Light Co., et al.*, 406 U.S. 621 (1972).

**State Regulatory Interests**

12. The North Carolina Utilities Commission (NCUC) urges that Sections 2(b) and 221(b) of the Communications Act reserve to the states the right to regulate intrastate telephone exchange service even where a portion of such service consists of interstate or foreign communication. The rulemaking proceeding presently pending before the NCUC involves an investigation into the effect of subscriber-provided equipment upon intrastate service and its economic effect upon the telephone using and consuming public. The NCUC has not reached any decision with regard to interconnection; publication of the proposed rule was only to establish the scope of the proceeding. There is no actual controversy yet, and it would be premature and beyond the Commission's statutory authority under the Administrative Procedure Act (5 U.S.C. 554(e)) to issue a declaratory order. Further, the Federal Communications Commission is not an appropriate forum to determine conflicts between a state and federal statute.[7] Moreover, since the regulation of interconnect equipment falls within the categories of communications that Congress excluded from federal control under Section 2(b) of the Communications Act, the FCC cannot claim preemption of the field through its statutory grant of authority. *Carterfone* did not open the door to indiscriminate installation of interconnect equipment and does not foreclose state action on interconnect equipment where it is shown to have an adverse effect on the telephone network.

13. Similar views were expressed by the National Association of Regulatory Utility Commissioners (NARUC)

[7] NCUC cites: *Arkansas Power & Light Co. v. FPC*, 156 F.2d 821, 833 (D.C. Cir. 1946); *Harvey Aluminum, Inc. v. NLRB*, 335 F.2d 749, 754 (1964).

[8] E.g., Missouri Public Service Commission, Georgia Public Service Commission, Public Utilities Commission of Ohio, Maryland Public Service Commission, Michigan Public Service Commission, Oregon (continued)

and various State Commissions.[8] They urge that the actions complained of by petitioners relate solely to intrastate telephone communications services, and therefore are beyond the jurisdiction delegated to the FCC by the Communications Act.[9] In claiming that Congress vested in the State Commissions exclusive jurisdiction over intrastate telephone service, including interconnection with respect to intrastate telephone communication, they rely on Section 2(b) and 221(b) of the Communications Act and the legislative history. See S. Rep. No. 781, 73rd Cong., 2d Sess., p. 3 (1934) noting that the Act "reserves to the States exclusive jurisdiction over intrastate telephone and telegraph communication"; and remarks of Senator Dill, especially at 78 Cong. Rec. 8823 (1934), stating:

> Now, taking up the bill, title I, containing the general provisions of the bill, creates a commission for the regulation of all radio and telephone and telegraph communications. We have attempted in title I to reserve to the State commissions the control of intrastate telephone traffic. We have kept in mind the fact that the Interstate Commerce Commission, through the Shreveport decision and the decisions in other similar cases, has gone so far in the regulation of railroads that the so-called "State Regulation" amounts to very little.
>
> We have attempted in this proposed legislation, to safeguard State regulation by certain

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Public Utility Commissioner, Washington Utilities and Transportation Commission, Public Service Commission of Wyoming, Alabama Public Service Commission, Tennessee Public Service Commission.

[9] They cite: *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 769 (1945); *Parker v. Brown*, 317 U.S. 341, 359-360 (1943); *Rice v. Board of Trade of City of Chicago*, 331 U.S. 247, 254 (1947); *Panhandle Eastern Pipeline Co. v. Public Service Commission of Indiana*, 332 U.S. 507, 517-519 (1947).

> provisions to the effect that where existing intrastate telephone business is being regulated by a State commission, the provisions of the bill shall not apply.

NARUC further asserts that the petition is an impermissible collateral attack on State administrative processes and should be dismissed.[10] And, finally NARUC takes the position that the relief requested by petitioners cannot be granted in a summary proceeding and should be considered by the Federal-State Joint Board in Docket No. 19528. NARUC states that "it cannot be doubted that the widespread commonality of use of terminal equipment and systems for both interstate and intrastate communications makes Federal-State cooperation on interconnection matters more appropriate than Federal-State confrontation."

14. Two States take a somewhat different position. The Public Service Commission of the State of New York states that a limited declaratory ruling may be warranted on the basis of the facts alleged in this proceeding to avoid potential conflicts based on the common use of inter-and intrastate facilities by customer-owned attachments. However, in issuing such a ruling the Commission should recognize that the jurisdiction of the several States over intrastate communications encompasses a regulatory responsibility for customer-owned equipment and that it would be inconsistent with the public interest to pre-empt the role of the several States in this area. The Public Service Commission of the State of California urges that the FCC has

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[10] Citing *Public Service Commission of Utah v. Wycoff Co.*, 344 U.S. 237, 243, 245-247 (1952); *Allegheny Airlines, Inc. v. Pennsylvania Public Utility Commission*, 465 F.2d 237 (3rd Cir. 1972), *cert. den.* _____ U.S. _____, 35 L.Ed. 2d 609 (1973); *Public Utilities of the State of California v. United Air Lines, Inc.*, 346 U.S. 402 (1953); *Alabama Public Service Commission v. Southern Railway Company*, 341 U.S. 341 (1951).

not yet acted to pre-empt State action on interconnection and should not do so now. If the States are left free to develop their policies individually until such time as a comprehensive interconnection program is instituted, a State commission may develop a more reasonable, practical and workable interconnection program as compared to those requirements presently in the interstate tariffs. The California Commission has recently initiated a proceeding to develop regulations designed to provide for independent testing and certification of equipment for interconnection with the telephone network, and should be free to proceed until a comprehensive federal program is instituted.

**Telephone companies**

15. Bell System Companies (AT&T), various independent telephone companies,[12] and the United States Independent Telephone Association express views similar to those of NCUC and NARUC on the question of jurisdiction. They urge that Congress has specifically reserved to the States the exclusive authority to regulate intrastate and telephone exchange communication services,[13] and has conferred on this Commission something less than the full

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[12] GTB Service Corporation on behalf of its affiliated telephone companies; United Telecommunications, Inc. on behalf of Carolina Telephone and Telegraph Company and United Telephone Company of the Carolinas, Inc.; and Continental Telephone Corporation.

[13] In addition to relying on Section 2(b) and 221(b) of the Communications Act and the legislative history cited by NARUC, AT&T refers to: H.R. Rep. No. 1850, 73rd Cong., 2d Sess. 7 (1934): 78 Cong. Rec. 10314 and 10316 (1934); Hearings on H.R. 8301 Before the House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess. 135-136 (1934); Hearings on S. 2910 Before the Senate Committee on Interstate Commerce, 73d Cong., 2d Sess. 8, 153 (1934); H.R. Rep. No. 910, 83d Cong., 1st Sess. 1 (1953); Statement of the Senate Committee on Interstate and Foreign Commerce, S. Rep. No. 1090, 83d Cong., 2d Sess. 1-2 (1954).

authority it was within the powers of Congress to grant.[14] AT&T further asserts that the past practice of the States in regulating telephone companies in general and interconnection in particular, as well as the local nature of the connections in question (since about 97 percent of telephone messages are intrastate), bar federal pre-emption.[15] The Commission's decisions in *Carterfone* and related cases have not pre-empted State action in this area, regardless of what was meant by the Commission, and the Commission should now defer to the judgment of the State regulatory agencies. Indeed, in *Jordaphone*, 18 FCC 644, 670-671 (1954), the Commission exercised its asserted jurisdiction in a way to support, not supplant, State jurisdiction. Moreover, it would not be appropriate for the Commission to issue a declaratory ruling since the North Carolina Rule R9-5 is only a proposed rule, and the advisory opinion of the Nebraska Attorney General is not a definite determination of State law.[16]

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[14] By way of support AT&T cites: *Sterling Manhattan Cable Television, Inc. v. New York Tel. Co.*, 38 FCC 2d 1149, 1156 (1973); *Doniphan Tel. Co. v. AT&T, et al.*, 34 FCC 950, aff'd 34 FCC 949 (1963); *Southwestern Bell Tel. Co. v. United States*, 45 F. Supp. 403, 406 (W.D. No. 1942); *Kitchen v. FCC*, 464 F.2d 801 (D.C. Cir. 1972).

[15] AT&T cites principally: *Head v. New Mexico Board*, 374 U.S. 424 (1963); *Rice v. Chicago Board of Trade*, 331 U.S. 247 (1947); FTC v. Bunte Bros., 312 U.S. 349 (1941); *Palmer v. Massachusetts*, 308 U.S. 79 (1939); *Southwestern Bell, supra*, 45 F. Supp. at 406; *California v. Zook*, 336 U.S. 725 (1949); *Penn Dairies v. Milk Control Comm'n*, 318 U.S. 261 (1943); *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission*, 341 U.S. 329 (1951); *Maurer v. Hamilton*, 309 U.S. 598 (1940).

[16] In arguing that the FCC has not pre-empted the field, other telephone company interests rely on the following in addition to cases cited by AT&T: *Panhandle Pipe Line Co. v. Comm.*, 332 U.S. 507, 513 (1947); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440; *Florida Avocado Growers v. Paul*, 373 U.S. 132, 142 (1963); *Farmers Union v. WDAY, Inc.*, 360 U.S. 525 (1959); *TV Pix v. Taylor*, 304 F.

(continued)

**Reply Comments**

16. The reply comments of the parties largely reiterate and expand on the views set forth in the comments. A few new points warrant brief mention.

17. The Department of Justice and others note that NARUC and AT&T, in quoting from Senator Dill's remarks on *Shreveport* during the debate on the 1934 Act, did not set forth the next two sentences of Senator Dill, as follows (78 Cong. Rec. 8823 (May 15, 1934)):

> We have in mind, for instance, cases where a city has telephone service connecting into a number of States, such as we have right here in Washington, running out into Maryland and out into Virginia, and in New York the service runs into New Jersey, and I think perhaps into Connecticut, though I am not sure about that. There are many cases in the country where, without some saving clause of that kind, the State Commissions might be deprived of their power to regulate; and the State Commission representatives were jealous, the preparation of this bill, that those rights should be protected; and we have attempted to do that.

They maintain that Senator Dill was concerned with the preservation of traditional state jurisdiction over local rates and service, not with the provision of equipment to be used in conjunction with both intrastate and interstate service. Moreover, the legislative history demonstrates that, whatever else Congress may have intended to preserve in the way of state jurisdiction, Congress specifically placed

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[16] (cont'd)

Supp. 459 (D. Nev. 1968), aff'd *per curiam*, 396 U.S. 556 (1970); *Chrysler Corp. v. Tofany*, 419 F.2d 499 (2d Cir. 1969); *Swift & Co. v. Wickham*, 364 F.2d 241 (2d Cir. 1966), *cert. den.* 385 U.S. 1036; *Colorado Anti-Discrimination Comm. v. Continental Airlines*, 372 U.S. 714, 724 (1963); *Parker v. Brown*, 317 U.S. 343, 353 (1943).

upon local telephone companies the duty of complying with Sections 201-205 of the Communications Act—the sections pursuant to which the *Hush-A-Phone* and *Carterfone* decisions were rendered.[17] The legislative history also evidences a concern with effective national regulation.[18]

18. The Department of Justice appends statements by representatives of the General Services Administration and the Federal Aviation Administration, which describe how any prohibition against interconnection of customer-provided equipment would impede present and projected communications programs of the U.S. Government. NATA, CBEMA, and others urge that there is no prematurity precluding a Commission declaratory ruling to remove an uncertainty that presently threatens the affected industries, the public's use of interstate communications facilities, the fundamental integrity of the Commission's processes, and the ability of the Commission to discharge its statutory responsibilities in the future. It is further asserted that the power Congress conferred upon the Commission to regulate the use of telephone equipment employed in the provision of interstate communication is not restricted by Section 2(b) and 221(b), and that the breadth of the *Shreveport* doctrine is unnecessary to sustain FCC jurisdiction over customer-supplied equipment used for interstate purposes.[19]

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[17] Citing: H.R. Rep. No. 1850, 73rd Cong., 2d Sess. 2 (1934); 78 Cong. Rec. 10313 (1934) (Remarks of Cong. Rayburn); 78 Cong. Rec. 8846-7 (1934).

[18] Citing, S. Rep. No 781, 73rd Cong., 2d Sess. 2 (1934); H.R. Rep. No. 1850, 73rd Cong., 2d Sess. 3 (1934); 78 Cong. Rec. 10216-17 (1934). 2d Sess. 3 (1934); 78 C...g. Rec. 10316-17 (1934).

[19] *Common Carrier Tariffs for CATV Systems*, 4 FCC 2d 257, 260 (1966).

19. NCUC asserts that *Carterfone* has no effect on the North Carolina proposed rulemaking procedure because it deals only with attachments to the existing system, whereas North Carolina's main concern is with replacements or substitutions of utility company furnished equipment. Moreover, *Carterfone* only requires that adverse effect to the system be established in order to prohibit interconnect devices and no action prohibiting customer-provided equipment would be taken by NCUC unless adverse effect was established by the evidence. Further, NCUC contends it is not proposing the creation of two separate systems for intrastate and interstate telephone service — which is not feasible or desirable. By the reference in proposed Rule R9-5 that interstate service was exempt, NCUC was primarily making a jurisdictional declaration. However, there are some totally interstate facilities (e.g., CATV lines, TV and radio circuits, dedicated private lines, signaling lines) which NCUC has no interest in reaching.

20. NARUC, AT&T and others assert that the *Shreveport* line of cases cited by proponents of the petition has no applicability to the instant situation in view of the legislative history of Section 2(b) and the deliberate refusal of Congress to grant the FCC pre-emptive powers of the type sanctioned by *Shreveport*. They further urge that Section 410(c) was designed to make the Federal-State Board procedure practicable and did not in any way substantively limit the States' authority under pre-existing law. AT&T asserts that in most Commission decisions relied on by the proponents of pre-emption, the Commission limited its determination to interstate and foreign service and avoided any claim of general power to pre-empt State regulation of intrastate communications.[20]

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[20] Citing, e.g.: *Use of Recording Devices*, 11 FCC 1033, 1037, 1054 (1947); *Jordaphone Corp.*, 18 FCC 644, 670-671 (1954); *AT&T-TWX*, 38 FCC 1127, 1132-34 (1965); *DOD v. General Telephone Co.*, 38 FCC 2d 803, 813-814 (Review Board 1973), *review den.*, FCC 73-854 (Aug. 8, 1973).

**Discussion and Conclusions**

21. Before addressing the specific legal and jurisdictional issues involved in this proceeding, we first take note of the questions raised as to the appropriateness of a declaratory ruling by the Commission designed to clarify the jurisdictional scope and effect of our *Carterfone* ruling and the tariffs filed in implementation thereof. In this regard, we are not obliged to, nor do we deem it appropriate to, await some definitive action by a State or a carrier which creates a conflict between Federal and State regulation having the ingredients of a conventional "case or controversy" before issuing such a ruling. As an administrative agency, we are vested by statute with broad and discretionary powers to devise and use procedures, such as the issuance of declaratory judgments, as may be reasonably appropriate to discharge our statutory responsibilities with respect to effective regulation of interstate and foreign communication, including the clarification of the scope and effect of rulings issued by us in the performance of those responsibilities. (See *F.C.C. v. Pottsville Broadcasting Co.*, 309 U.S. 134, 142-43 (1940); Section 4(j) of the Communications Act; *NBC v. U.S.*, 319 U.S. 190, 219 (1943); *CTE Service Corp. v. F.C.C.*, 474 F.2d 724 (C.A. 2, 1973); *Philadelphia Television Broadcasting Co. v. F.C.C.*, 258 F.2d 282 (C.A.D.C. 1964)).

22. We believe that it is particularly appropriate in the instant case to take action by way of a declaratory judgment in order to remove or alleviate the uncertainty and confusion that has been created with respect to the application and effects of our *Carterfone* ruling by the NCUC proposed Rule R9-5 and the advisory opinion of the Attorney General of Nebraska. We believe that it would be contrary to the public interest to await the formal adoption and implementation of those State actions before dealing with the conflicts and confusion that such threatened actions have already generated. The course being pursued by NCUC and

the Attorney General of Nebraska, and possibly by other States,* is a source of great controversy and confusion for manufacturers and users of customer-provided communications equipment and also casts doubt to the continuing efficacy, application and effects of *Carterfone* and the effective tariffs on file with this Commission in implementation of *Carterfone.* We would be remiss in the discharge of our broad statutory responsibilities to remain passive in the face of the policy and regulatory confusion which permeates the entire field of interconnection as a result of these State actions.

23. Concerning the recommendation that these matters be referred to the Federal-State Joint Board that we have created pursuant to Section 410 of the Communications Act, we do not believe the Joint Board to be an appropriate forum for the resolution of the jurisdictional issue raised by the North Carolina and Nebraska actions. The Joint Board is an appropriate vehicle for the consideration of technical and economic aspects of the interconnection policies and tariffs. It is not a proper or appropriate vehicle for determining the statutory jurisdiction of this Commission and the legal effects of policies promulgated by us in furtherance of our statutory responsibilities.

24. We turn now to the merits of the questions concerning the extent to which our *Carterfone* ruling and the implementing interstate tariffs have preempted and foreclosed conflicting or inconsistent actions by the States or the carriers in the interconnect area.

25. Those parties who argue that *Carterfone* has preemptive effect upon State action rely, in essence, upon those provisions of the Communications Act which give the Commission comprehensive and pervasive powers and responsibilities with respect to the regulation of interstate and

* We discuss in paragraphs 54-56 the recent actions by the Oklahoma Corporation Commission.

foreign communication and common carriers engaged in the furnishing of such communication. Those parties who argue that the *Carterfone* ruling has no preemptive effects rely upon certain provisions of the Communications Act, notably Sections 2(b) and 221(b), which place certain limitations upon the Commission's jurisdiction. A realistic evaluation of the merits of these arguments, in light of the statutory scheme of the Communications Act, requires at the outset that we take account of the nature of the telephone system and telephone service to which such statutory scheme of regulation applies.

26. It is undisputed that we are dealing with a nationwide network of interconnected telephone exchanges. These exchanges provide the single means by which telephone subscribers have access to the telephone system for making or receiving local telephone calls within an exchange area, intrastate calls to or from subscribers served by other exchanges in the same state, and interstate or foreign calls to or from subscribers served by exchanges in other states or foreign countries. In other words, exchange plant, particularly subscriber stations and lines, is used in common and indivisibly for all local and long distance telephone calls. There is no interstate message toll telephone service either offered or practically possible except over exchange plant used for both intrastate and interstate and foreign service.

27. That the Commission has plenary and comprehensive regulatory jurisdiction over interstate and foreign communications services and facilities of common carriers and all of the terms and conditions upon which such services and facilities are offered to the public is evident from the provisions that in these instances where the rendition of interstate and foreign service is dependent upon plant facilities which are also used for exchange or other intrastate services, the Federal role must be controlling. These conclusions follow from a consideration of

the express purposes sought to be achieved by the Congress and the specifics of the statutory scheme formulated by the Congress to accomplish those purposes.

28. Congressional purposes are clearly indicated in the first paragraph of the Communications Act of 1934 wherein it is stated that the Commission was created for "the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . ." (Section 1). The intent is further stated in the next section which provides that the Communications Act shall "apply to all interstate and foreign communication by wire or radio . . . and to all persons engaged within the United States in such communications . . ." (Section 2(a)). In the third section it is made clear that the Commission's authority over interstate communication by wire or radio covers not only the "transmission" of messages but also "all instrumentalities, facilities, apparatus and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission" (Section 3(a) and (b)). Sections 201 and 202 outlaw unjust, unreasonable and discriminatory practices by any common carrier in connection with its furnishing of interstate and foreign communication. The Act also requires the common carrier to file with this Commission "schedules showing all charges for itself and its connecting carriers for interstate or foreign wire or radio communication . . . and showing the classifications, practices, and regulations affecting such charges" (Section 203(a)). No carrier "shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this Act . . . and no carrier shall . . . extend to any person any privileges or facilities, in such communication, . . . except as specified in such schedule" (Section 203(e)). The

Commission is empowered to conduct hearings concerning the lawfulness of any new or existing charge, classification, regulation or practice of a common carrier (Section 204) and to prescribe just and reasonable ones (Section 205). For purposes of these Sections of the Act (Sections 201-205), Congress explicitly granted this Commission jurisdiction over all common carriers engaged in interstate or foreign communications, including "connecting carriers" who are exempt from certain provisions of the Act other than Sections 201 through 205[21] and 301.

29. Other provisions of the Communications Act vest the Commission with a wide range of powers to facilitate implementation of the substantive requirements and proscriptions of Sections 201 to 205. What is particularly noteworthy here is that in apparent recognition of the indivisible character of carrier plant and operations these other provisions make no distinction in terms of their application between the intrastate and interstate services, operations and activities of a carrier. Thus, Section 219 empowers the Commission to prescribe the form and content of the annual and monthly reports to be filed by carriers with respect to all aspects of their business and operations. Section 220 empowers the Commission to prescribe the form of any and all accounts and records to be kept by the carriers, as well as the depreciation charges to be entered by the carriers in their accounts. Sections 221(c) and (d) of the Act give the

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[21] "Connecting carriers" engage in interstate and foreign service only through physical connection of their facilities with the facilities of other carriers with which they have no direct or indirect corporate or other affiliation. Connecting carriers are nevertheless expressly subject to the substantive requirements of Sections 201 through 205 of the Act, except they are relieved of the tariff filing requirements of Section 203. However, their participation in interstate and foreign services is governed by the same terms and conditions of the tariff schedules filed with the Commission by the carriers with which they connect. (See Sections 3(u) and 2(b) of the Act.)

Commission authority to classify the property of carriers and to determine what property shall be considered as used in interstate and foreign toll service. After making such classification, the Commission may in its discretion value only that part of the property of the carrier determined to be used in interstate and foreign telephone toll service. Here again, the Act makes clear the primacy of Federal jurisdiction with respect to property clearly used to provide interstate and intrastate services and facilities. Finally, in keeping with the all-embracing scheme of the Communications Act that the Commission should regulate interstate and foreign communication "so as to make available a rapid, efficient Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . ." (Section 1), the provisions of Section 218 direct the Commission to keep itself informed as to the manner and method in which the business and management of the carriers are conducted and as to technical developments and improvements in wire and radio communication to the end that the benefits of new inventions and developments may be made available to the people of the United States.

30. Acting within the general context of the provisions of the Communications Act and Section 201(b) in particular, the Commission in *Carterfone* declared unlawful the prohibition in AT&T's interstate tariffs against the use of all customer-owned equipment and ordered AT&T to file appropriate revisions to its interstate tariffs which would remove this "unwarranted interference with the telephone subscriber's right to use his telephone in ways which are privately beneficial without being publicly detrimental." In response to this ruling, AT&T filed the revised tariffs which are now effective and which the Commission accepted as being consistent with the *Carterfone* ruling. *AT&T "Foreign Attachment" Tariff Revision*, 15 FCC 2d 605 (1968).

31. Because *Carterfone* and the implementing tariffs operate upon the terms and conditions under which subscriber-owned equipment may be interconnected to the telephone network, and because that network is used in common for intrastate and interstate services, AT&T recognized that uniform interconnection practices must apply to both services. Hence, the Bell System companies promptly filed conforming revisions to their "foreign attachment" tariffs on file with the several State commissions applicable to intrastate services. No carrier, State commission or other party pursued judicial review of the Commission's *Carterfone* ruling or challenged the jurisdiction of the Commission to make that ruling or to accept the tariffs filed in response thereto.

32. The proponents of the North Carolina proposed rule, relying principally upon Sections 2(b) and 221(b) of the Communications Act contend, variously, that Congress reserved to the States the exclusive right to regulate exchange and other intrastate services including the use of customer-owned equipment in connection with such services; that this asserted exclusive right bars any preemptive effect of Federal action in matters of customer interconnection; and that the States are not barred from taking action concerning customer interconnection even though such action may derogate or conflict with the Federal ruling.* The proponents of this position are less than clear as to the practical effects upon telephone service resulting from conflicting Federal and State rulings except to suggest that separate facilities could be provided for interstate and intrastate services or that the Commission should simply defer to the State commissions as to the appropriate rule.

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* We note that counsel for AT&T conceded at oral argument that Section 221(b) is not determinative of the jurisdictional question (Tr. 102-103).

33. It is our conclusion that this construction of Sections 2(b) and 221(b) is erroneous for the following reasons:

34. First, as we discussed at the outset, the Commission's powers to regulate interstate and foreign communications services are comprehensive and pervasive and embrace the terms and conditions under which customers shall be reasonably permitted to use their own equipment in connection with such services. The provisions of Section 2(b) and 221(b) are to be construed in light of this overall statutory scheme. For, the "Communications Act must be read as a whole and with appreciation of the responsibilities of the body charged with its fair and efficient operation" *(United States v. Storer Broadcasting Company,* 351 U.S. 192, 203 (1956)). As the Court of Appeals for the District of Columbia Circuit recognized in *General Telephone Co. of California v. F.C.C.* (413 F.2d 390), the Act "must be construed in light of the needs for comprehensive regulation and the practical difficulties inhering in state by state regulation of parts of an organic whole" (413 F.2d at 398). For, "fifty states and myriad local authorities cannot effectively deal with bits and pieces of what is really a unified system of communication" (*id.* at 401).

35. Second, because of the commonality of telephone company plant and facilities used to provide intrastate and interstate services and the indivisibility of such plant and facilities, rules governing interconnection of customer-owned equipment must be the same for interstate and intrastate services. Here it is to be stressed that customer-owned equipment which is now available and in demand is either incapable of distinguishing in its use and operation between intrastate and interstate calls, or where such capability technically exists, it would make no sense from an economic or operational standpoint for the customer to arbitrarily confine its use to interstate service.

36. Third, this Commission has repeatedly exercised jurisdiction over facilities and instrumentalities used in in-

terstate communication despite the circumstance that such facilities are used also to provide intrastate service. See *AT&T—TWX*, 38 FCC 1127 (1965); *DOD v. General Telephone Co.*, 38 FCC 2d 803, 807-812 (Review Board 1973), aff'd FCC 73-854 (1973); and the precedents cited in these two cases.

In an early Commission case, *Use of Recording Devices*, 11 FCC 1033 (1947), we rejected arguments of the carriers that, under Sec. 2(b)(1) and 221(b) of the Act, "the jurisdiction of the Commission to make an order regulating the use of recorders is limited to use in connection with facilities which are exclusively interstate" (11 FCC at 1046) and stated that this argument ignored

> "the basic grant of jurisdiction to this Commission over interstate and foreign communications by wire or radio (see Communications Act, see 1 and 2(a)) and it pays no heed to the fact of operation of telephone recording devices" (11 FCC at 1047).

We stated further that regulation of interstate and foreign message telephone service

> "necessarily involves all the facilities, charges, classification, practices, service and regulations used in the rendition of the service, and regulation of such service must be able to deal with all or any of the matters so involved of it is to be effective" (11 FCC at 1047).

In 1953 we stated in the *Katz* case that

> "The fact that the same instruments are used for both interstate and intrastate services and that intrastate service is subject to state and local regulation does not alter the Com-

> mission's duties and obligations with respect to interstate telephone facilities. Were the Commission to exercise its jurisdiction only where the telephone facilities in question were exclusively interstate in character, it would result in virtually complete abdication from the field of telephone regulation by the Commission" *Katz v. ATT*, 8 RR 919 at 923 (1953)).

Later in *Jordaphone Corp. of America v. ATT*, 18 FCC 644 (1954), we rejected the carriers' contention that because tariff regulations prohibiting the use of customer-owned automatic answering devices affected intrastate and exchange telephone service, the Commission was without jurisdiction to entertain a complaint alleging the unreasonableness of such regulations. Although we required the carriers to file revised tariffs allowing the use of answering devices where authorized by state or local authorities, we stated:

> "Despite the fact that the individual telephone installation is used more extensively for intrastate telephone communications than for interstate and foreign toll telephone service, it is clear that this Commission, pursuant to sections 1 and 2(a) of the Communications Act of 1934, as amended (47 U.S.C. 151, 152(a)), has jurisdiction insofar as the 1.2 percent interstate and foreign toll message calls are concerned" 18 FCC at 670.

We also stated that while we hesitated to exercise jurisdiction in such a way as to preclude exercise of jurisdiction by state or local bodies, we would do so where,

> "the record reveals a very clear need for such action so far as interstate telephone service is concerned" 18 FCC at 670.

We expressly found such a need in the *ATT-TWX* and *DOD v. GTE* cases quoted above. We stated in *ATT-TWX* that:

> "To the extent the carrier provides station equipment for use in connection with both interstate and intrastate communication, the Commission has authority to regulate the charges for interstate use of those facilities in order to insure lawful performance of the interstate service" (38 FCC at 1132) and that
>
> "We find nothing in section 2(b)(1) which imposes any limitation upon our full authority over interstate communication service. For us to conclude that, because facilities and instrumentalities are used in intrastate as well as in interstate communication service, we do not have jurisdiction or that we should not exercise it, would leave a substantial portion of the interstate communication service unregulated. We do not believe Congress so intended" (38 FCC at 1133).

Our decision in that case concludes that ". . . on the basis of statements and comments presented herein by the parties it is not practicable to establish separate interstate and intrastate schedules of charges . . . " 38 FCC at 1134 A similar conclusion was reached in *DOD v. GTE.*

The courts have held that transmission facilities located entirely within one state are not immune from Commission regulation if those facilities are used for interstate communications. *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968); *Ward v. Northern Ohio Telephone Co.*,

300 F.2d 816 (6 cm.) *cert. denied*, 371 U.S. 820 (1962); *California Interstate Co. v. F.C.C.*, 328 F.2d 556 (D.C. Cir. 1969). The Courts have also held that Commission regulation of interstate communication does not end at a local switching apparatus but runs to the ultimate destination of the transmission. *U.S. v. ATT*, 57 F. Supp. 451 (S.D. N.Y. 1944), aff'd. sub nom. *Hotel Astor, Inc. v. U.S.*, 325 U.S. 837 (1945). And in *Ivy Broadcasting Co. v. A.T.T.*, 391 F.2d 486 (2d Cir. 1968) the Court held that when a local transmission facility is included in an interstate trasmission network, the regulation of the interstate uses of that facility lies exclusively with the F.C.C.

37. Fourth, the legislative history of the Communications Act clearly shows that in enacting Sections 2(b) and 221(b), the Congress was primarily concerned with the preservation of traditional State jurisdiction over intrastate rates and services, i.e., to make certain that the Federal Communications Commission could not regulate intrastate rates and services in the manner that intrastate transportation's rates and servcies were being regulated by the Interstate Commerce Commission. Clearly, Congress sought to exclude the FCC from regulation of truly intrastate service, including those local exchange services referred to in Section 221(b) where such local exchange area straddles a state border and to this limited extent constitutes interstate service. But the latter is the only aspect of interstate service that the Congress felt warranted in reserving to the States.[22] There is nothing in the Communication Act or its legislative history which supports the position

[22] See, e.g., 78 Cong. Rec. 8823 (May 15, 1934); 78 Cong. Rec. 8846-8847 (1934); H.R. Rep. No. 1850, 73rd Cong., 2d Sess. 2, 3 (1934); 78 Cong. Rec. 10313 (1934); S. Rep. No. 781, 73rd Cong., 2d Sess. 2 (1934); 78 Cong. Rec. 10316-17 (1934). See also, *Southwestern Bell Telephone Co. v. United States*, 45 F. Supp. 403, 404 (W. D. Mo. 1942).

taken by the proponents of the North Carolina proposed rule that Section 2(b) and/or 221(b) reflects a Congressional intent that where common exchange plant is used to provide both exchange and other intrastate services as well as interstate services, a State may, in effect, determine the terms and conditions upon which such common plant is to be used for interstate service. It is one thing to exempt intrastate services from Federal jurisdiction. It is quite a different matter to argue that by virtue of this exemption plant used in common for both intrastate and interstate services is beyond Federal jurisdiction and that subscribers can be subjected to a melange of regulations, determined by each of 50 separate jurisdictions, as to the terms and conditions upon which they shall have access to and use of the telephone network for interstate services. If each State were to be free to establish its own rules governing interconnection for the purposes of intrastate services, uniform nondiscriminatory interstate service throughout the country would be rendered difficult if not impossible. Because of the indivisibility of the network, it is impossible, from a practical economic and operating standpoint, for a common carrier to comply with conflicting Federal and State regulation.[23] Moreover, if a State were to bar interconnection of customer-provided equipment for intrastate service in derogation of a Federal rule, the carrier would be placed in an untenable position of having to violate either the State ruling or the Federal ruling. All of these results would frustrate the Congressional purpose in establishing the Commission to "make available . . . a rapid, efficient, Nation-wide . . . communication service with adequate facilities at reasonable charges . . ." (Section 1).

38. For all of the foregoing reasons, this Commission has primacy in authority over the terms and conditions gover-

[23] And clearly it would make no economiv or operational sense to provide separate facilities for intrastate and interstate services in order to comply with conflicting rules.

ning the interconnection of customer-provided equipment to the nationwide telephone network. No State regulation can oust this Commission from its clear jurisdiction over interstate communications and the regulation of the terms and conditions governing such communication, including the right of subscriber interconnections. A "holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulation is a physical impossibility for one engaged in interstate commerce." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963). See also cases cited in footnote 6 above.

39. Although we have asserted Federal primacy in this area, it does not follow that the State commissions have no proper interest or that they are to be denied a participating role and thus become merely onlookers to purely unilateral action by the FCC. Congress, at the time that it enacted the Communications Act, recognized the potential impact of the regulatory power given to this Commission over intrastate matters and the States' regulation thereof, particularly in those instances where service to the public involved the use of common plant and facilities. Accordingly, Congress established a statutory mechanism to make it possible that State concerns and viewpoints would be duly reflected in the Commission's actions in areas of common regulatory concern. Specifically, Section 410 of the Communications Act makes provision for State participation in Commission proceedings through several types of procedures including the use of Federal-State joint boards to preside over hearings and to make recommendations to the Commission as to the ultimate decision the FCC should reach in the particular matter. In 1971, Congress further amended the Act by adding a provision (Section 410(c)) making mandatory, rather than permissive, the use of the Federal-State Joint Board procedures to resolve separation issues with respect to common carrier property. It is

relevant to note in this case that this amendment, enacted just two years ago, again stressed the primacy of the Federal jurisdiction by reserving to this Comission the final decision-making powers.[24]

40. In the current situation, we have respected the interest of the States in this matter of interconnection, as well as the effect of any ruling which we may make upon intrastate services. Accordingly, as noted above, to accommodate to the fullest extent possible all reasonable and legitimate concerns of such State jurisdictions we have established a Joint Board pursuant to the provisions of Section 410 to address itself to the question of whether customer interconnection should be liberalized beyond that now permissible under our *Carterfone* ruling and the implementing tariffs, and, if so, what conditions, rules, regulations and other requirements should be imposed in connection with such further liberalization. *Interstate and Foreign MTS and WATS*, 35 FCC 2d 539, 542 (1972).

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[24] The Senate Committee Report (p. 2) notes that while the Federal and State "jurisdictions are separate for interstate and intrastate services, the plant facilities are to a great extent the same for both." The Report also recognizes that the Federal Government pre-empts the States in the area of Federal jurisdiction, stating:

> Although the States regulate, in the aggregate, 70 percent of Bell's plant investment, no one State has jurisdiction over as much as the approximately 30 percent regulated by the Federal Communications Commission, and the interests of the various States can be different. More importantly, the Federal Government pre-empts the States in the area of Federal jurisdiction. Thus, if the Commission declares its rate base to include certain costs, these costs are not used in determining a State's rate base; conversely, if the Federal Communications Commission does not use certain costs, the State may be left with these costs in determining its rate base—and correspondingly higher rates for local services to the local consumer. (S. Rept. 362, 92d Cong., 1st Sess. p. 3).

41. Turning now to the effects of the actions we have taken in the interconnect area on State action in the same area, we point out that our actions do not foreclose any State from taking action of its own in the interconnect area so long as such action does not derogate the interstate ruling. A principal thrust and aim of the interstate tariff filed in compliance with our *Carterfone* ruling is to make certain that the telephone network and the employees operating and maintaining that network will be protected from any harm that may be occasioned by the use of customer-owned equipment or systems. Hence, the tariff requirement that such equipment or system can be directly connected to the telephone facilities only through protective interface devices offered by the telephone companies pursuant to those tariffs. Neither the *Carterfone* ruling nor these tariffs prevent any State from providing *additional* options to customers with respect to interconnection provided that they are alternatives to, rather than substitutes for, the requirements specified in the interstate tariffs, and provided further that such regulations accomplish the protective objectives of the interstate tariff regulations and in no way permit interference with or impairment of interstate services. Any such additional option authorized by State action would, of course, be required under Section 203 of the Communications Act, to be properly reflected by the telephone companies in their tariffs on file with this Commission applicable to interstate service. Under such a procedure, this Commission would have an opportunity to consider each such additional customer option in terms of its effects upon interstate service. A case in point is represented by the New York Public Service Commission's action with respect to an additional interface arrangement offered by the Rochester Telephone Company (Opinion No. 72-18, Case 26064 (August 21, 1972)).

42. Nor do our actions in the interconnect area foreclose any State from the full exercise of its investigatory powers with respect to the effects of interconnection as related to

the quality of telephone service or the regulation by the State of intrastate rate structures and revenue requirements for services subject to its jurisdiction. This Commission has been monitoring interconnection to ascertain the nature and extent of any harm caused thereby. We have also been monitoring the manner and effectiveness with which the telephone companies are administering their tariff regulations, with particular reference to the availability and efficiency of the interface protective arrangements required by such tariffs. We would expect the State commissions to do likewise in discharging their responsibilities with respect to the maintenance of efficient intrastate service. A continued and systematic exchange of information on these matters between the FCC and the several states would be mutually beneficial and in furtherance of our common objective of promoting the public interest in efficient service. Also, this type of Federal-State interaction would enhance the ability of this Commission to take prompt appropriate corrective measures indicated to be warranted by the information generated.

43. There is one additional matter which should be addressed at this time even though it does not relate directly to the issues before us. This is the concern expressed by telephone companies and certain elements of the regulatory community with respect to what they believe to be potential harmful effects of interconnection on telephone service and intrastate rates and revenue requirements applicable to basic exchange services. In general, it has been urged that to the extent our policy established a competitive market for terminal equipment and systems, it forces the carriers to reduce their rates in order to compete in this market for such equipment. This, in turn, it is alleged, causes a loss of revenue to the carriers which prior to competition had been available to offset revenue requirements related to basic exchange services, and thereby requires higher rates for such basic services. It is urged that until these consequences are fully explored and evaluated as to their effects on the costs

and availability of basic exchange service there should be no further liberalization of interconnection. It has also been suggested that until the *Carterfone* policy and its effects have been reevaluated, there should be a moratorium on permissible interconnection of any kind.

44. In our Notice of Inquiry in Docket No. 19528, we gave no specific consideration to questions as to whether and to what extent there might be adverse economic consequences from further liberalization of customer interconnection by the ultimate adoption of any of the proposals before us in that proceeding. We therefore specified in our First Supplemental Notice in Docket No. 19528 that we would "cover such issues in an appropriate manner by further supplemental notices in the near future."

45. In light of representations made to us in connection with the instant proceeding, we propose to broaden our review of potential adverse effects to include alleged economic effects which may result from currently permitted use of customer-provided equipment. We shall, at an early date, formulate and release specific issues designed to elicit the necessary information and provide a framework for proper decision-making.

46. Any such expansion of the issues in Docket No. 19528 or in a separate proceeding is not to be construed as an indication that we have any reason to question the merits of our *Carterfone* policy or the public benefits we perceive to have resulted from that policy thus far. Our purpose will be instead to afford an opportunity to the critics of customer interconnection to substantiate and document by meaningful and probative evidence the specific nature and extent of the economic or other detriments they allege are or will be the consequence of customer interconnection as it is presently authorized or as it might be liberalized in accordance with any of the proposals now being considered in

Docket No. 19528. We will also expect them to make a persuasive showing as to whether, to what extent, and in what specific areas the markets for interconnect equipment and systems have the unique characteristics which would warrant relegating that market to monopoly supply by the telephone companies rather than to competitive sources of supply.

47. In fairness to all parties concerned, we deem it in order to state our view at this time that under a free enterprise system, particularly in this instance where there is an existing and growing competitive market for customer-provided interconnect equipment, any governmental action designed to prohibit or restrict the competitive operation of such a market would be of questionable validity and legality unless supported by compelling and cogent public policy considerations. Our purpose in enlarging the proceedings in Docket 19528 (or in a separate proceeding) will be to ascertain whether such public policy considerations are present as to warrant the extension of the natural monopoly concept to the interconnect market.

48. We now address certain significant issues relating to Title III of the Act that were not specifically covered in the briefs and oral argument. These questions relate to the implications of the proposed rule of NCUC upon our exclusive jurisdiction under the Act to license radio facilities.

49. Both Sections 2(b) and 221(b) of the Act, which are relied upon heavily by the proponents of the NCUC rule, begin with language that makes it clear that State action must yield to the sole jurisdiction and power of the Commission to license radio facilities in the public interest. This licensing jurisdiction applies to radio facilities irrespective of whether they are to be used for interstate or intrastate purposes. In North Carolina, as in every other State, the telephone companies and many of their interconnecting customers are users of radio facilities licensed by this Commission. Under Title III of the Act all licensees are subject

to the requirements that they operate in the public interest and in accordance with national policies as expressed in the Act and as developed by our regulatory actions. (See e.g., *Guardband Decision*, 12 FCC 2d 841 (1968); 14 FCC 2d 269 (1968); 409 F. 2d 322 (1969)).

50. Thus, our findings herein that the Federal role is paramount and controlling in the area of interconnection to the nationwide telephone network is premised not only upon the provisions of Title I and Title II of the Act as heretofore discussed, but also upon the provisions of Title III and the national policies reflected therein.

51. A key provision of the proposed rule of the NCUC is that "The telephone company shall own, service and be fully responsible for and accountable to the Utilities Commission and to its customers for adequate service and maintenance of *all equipment used in telephone service* in North Carolina" (emphasis added). *Telerent Leasing Corp.* 43 FCC 2d 487, at page 491. This NCUC rule, if adopted and made effective, would mean that all private mobile and other radio systems licensed by us in North Carolina would no longer be interconnected with the switched telephone system and this would be in direct conflict with our policy of liberal licensing of private radio systems and our policy under *Carterfone* of harmless interconnection of all such radio systems with the common carrier network. Indeed, the interconnect facilities involved in the *Carterfone* case were private mobile radio systems which were being furnished by the customers themselves in substitution for radio systems otherwise available from telephone companies as part of their telephone service offerings to the public.

52. With respect to that portion of the advisory ruling by the Attorney General of the State of Nebraska that a hotel or motel could not interconnect privately-owned communications equipment with the facilities and services of a

telephone company without certification as a common carrier, the following observations appear to be in order. We do not believe that hotels or motels should be treated any differently from other businesses so far as the ownership, operation and interconnection of their own equipment or systems are concerned. With respect to interstate service, we perceive no reason why a hotel or motel should be obliged to lease from the telephone company rather than own its own internal equipment or system. Nor do we perceive why its lease of facilities from the local telephone company rather than its ownership of such facilities procured from other sources should affect any determination of its status as a regulated entity under State law or of its right to interconnection.

53. We recognize, however, that under the statutes or judicial rulings of a particular State, hotels or motels may, under appropriate circumstances, be subject to State regulation as common carriers or public utilities and require certification as such. Whether this is the situation in the State of Nebraska, we are not called upon to ascertain nor would it be appropriate for us to judge. This is a question that must be determined in the first instance within the State jurisdiction. We merely note in passing that national policy under *Hushaphone* and *Carterfone* requires that all customers, including hotels and motels, be free to obtain their own systems from either the telephone company or non-telephone company sources and to interconnect such systems with the national network for interstate communications, subject only to reasonable requirements to prevent harm to the network, its employees or service of others. Furthermore, if any hotel or motel is definitely termed a common carrier by state law, such hotel or motel could apply to us for interstate carrier-to-carrier interconnection under Section 201(a) of the Act and could seek division of revenue with the telephone companies participating in such interconnect service. It could also seek

such other relief as may be necessary to enable it to render interstate communications service. We will retain jurisdiction in this matter to consider the effect of State action in this area.

54. Finally, we take notice of the General Order of the Corporation Commission of the State of Oklahoma, issued January 14, 1974, which adopts rules governing telephone companies and telecommunications in Oklahoma. Rule 16 (a) provides that:

> (a)Authority to Interconnect: No telephone company shall connect or permit connection of any of its lines, facilities or equipment with any lines, facilities or equipment owned, furnished, maintained or serviced by another person furnishing telephone or telecommunications service, unless that person has been granted a certificate of convenience and necessity therefor by the Commission.

Rule 16 (b) states:

> (b)Customer Owned Equipment: This rule shall not prevent the connection of equipment owned exclusively by the customer, and not owned, furnished, maintained or serviced by any other person, when such customer owned equipment is installed and connected in accordance with the approved rules and conditions of service of the telephone company.

55. Rule 16 (a) on its face encompasses more than the interconnection of customer provided equipment and extends to interconnection between the facilities of a telephone company and the system of another carrier, such as a specialized or domestic satellite carrier offering interstate

services. As such it poses a clear conflict with the Communications Act and our interconnection policy in the specialized carrier and domestic satellite fields. With respect to the provision of interstate and foreign communications, Sections 214 and 201 (a) of the Communications Act grant this Commission exclusive authority to issue certificates of convenience and necessity and to order interconnection between carriers. Moreover, we have imposed a requirement that telephone companies shall furnish to specialized and satellite carriers such interconnection facilities as are essential to the provision of their authorized interstate services, pursuant to tariffs filed with this Comission. *Specialized Common Carrier Services*, 29 FCC 2d 870, 940 (1971); *Second Report and Order* in Docket No. 16495, 35 FCC 2d 844, 856 (1972); *AT&T*, 42 FCC 2d 654, 655-661 (1973). The telephone companies involved are not excused from prompt compliance with our interconnection policy and orders because of the rule adopted by the Oklahoma Commission.

56. Further, with respect to Rule 16 (b), we note that our *Carterfone* ruling and the implementing tariffs do not distinguish between customer-owned and customer-leased equipment. For purposes of interstate service, we see no reason why there should be any absolute bar against interconnection of customer-leased equipment maintained or serviced by the lessor. In the case of computer equipment leased from IBM Corp., for example, the lessor may be much better qualified to maintain and service the equipment than the customer. Accordingly, in this area also the Oklahoma rule squarely conflicts with the Federal ruling.

57. In light of all of the foregoing, IT IS HEREBY ORDERED that the petition for a declaratory ruling IS GRANTED to the extent reflected herein and IS OTHERWISE DENIED.

58. IT IS FURTHER ORDERED that the motion of NATA for expedited action and immediate relief IS DISMISSED as moot.

59. IT IS FURTHER ORDERED that the motions of NARUC and Southern Pacific to correct the transcript of oral argument ARE GRANTED.

60. IT IS FURTHER ORDERED that the Commission retains full jurisdiction over the question discussed in paragraph 52 and 53 above.

FEDERAL COMMUNICATIONS COMMISSION

Vincent J. Mullins
Secretary

## APPENDIX D

## FEDERAL COMMUNICATIONS ACT OF 1934, AS AMENDED

### 47 U.S.C., Sec. 151

### § 151. Purposes of chapter; Federal Communications Commission created

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and

radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter. June 19, 1934, c. 652, Title I, § 1, 48 Stat. 1064; May 20, 1937, c. 229, § 1, 50 Stat. 189.

**47 U.S.C., Sec. 152**

**§ 152. Application of chapter**

(a) The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone.

(b) Subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (3) any carrier engaged in interstate or foreign communication solely through connection by radio, or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or

(4) any carrier to which clause (2) or clause (3) of this subsection would be applicable except for furnishing interstate mobile radio communication service or radio communication service to mobile stations on land vehicles in Canada or Mexico; except that sections 201-205 of this title shall, except as otherwise provided therein, apply to carriers described in clauses (2)-(4) of this subsection.

**47 U.S.C., Sec. 221(b)**

Subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof, even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State commission or by local governmental authority.

**47 U.S.C., Sec. 410(c)**

(c) The Commission shall refer any proceeding regarding the jurisdictional separation of common carrier property and expenses between interstate and intrastate operations, which it institutes pursuant to a notice of proposed rulemaking and, except as provided in section 409 of this title, may refer any other matter, relating to common carrier communications of joint Federal-State concern, to a Federal-State Joint Board. The Joint Board shall possess the same jurisdiction, powers, duties, and obligations as a joint board established under subsection (a) of this section, and shall prepare a recommended decision for prompt review and action by the Commission. In addition, the State members of the Joint Board shall sit with the Commission en banc at any oral argument that may be scheduled in the proceeding. The Commission shall also afford the State members of the Joint Board an opportunity to participate in its deliberations, but not vote, when it has under con-

sideration the recommended decision of the Joint Board or any further decisional action that may be required in the proceeding. The Joint Board shall be composed of three Commissioners of the Commission and of four State commissioners nominated by the national organization of the State commissions, as referred to in section 302(b) and 305(f) of Title 49, and approved by the Commission. The Chairman of the Commission, or another Commissioner designated by the Commission, shall serve as Chairman of the Joint Board.

As amended Sept. 30, 1971, Pub.L. 92-131, § 2, 85 Stat. 363.

## APPENDIX E

### ADMINISTRATIVE PROCEDURE ACT

#### 5 U.S.C., Sec. 554(e)

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty. Pub.L. 89-554, Sept. 6, 1966. 80 Stat. 384.

#### 5 U.S.C., Sec. 706

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall —

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be —

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.

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